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DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 25

RIN 0503–AA09

Designation of Rural Empowerment Zones and Enterprise Communities

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements that portion of Subchapter C, Part I (Empowerment Zones, Enterprise Communities and Rural Development Investment Areas) of Title XIII of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, approved August 10, 1993) dealing with the designation of rural Empowerment Zones and Enterprise Communities. This rule authorizes the Secretary of Agriculture (USDA) to designate not more than three (3) rural Empowerment Zones and not more than thirty (30) rural Enterprise Communities based upon the effectiveness of the strategic plan submitted by an applicant and nominated by a State or States and local governments.

The purpose of this program is to empower rural communities and their residents to create jobs and opportunities to build for tomorrow as part of a Federal-State-local and private-sector partnership. Businesses will be encouraged to invest and create jobs in distressed areas, and comprehensive local strategic plans are to be adopted and implemented, encouraging entrepreneurship, furthering local self-development and assisting in the revitalization of these areas.

EFFECTIVE DATE: March 8, 1995.

FOR FURTHER INFORMATION CONTACT: Sandi Brewster-Walker, Deputy Administrator, Rural Business and Cooperative Development Service, Reporters Building, Room 701, 300 7th Street, SW, Washington, DC 20024, telephone 1–800–645–4712, or by sending an Internet Mail message to: ezecdir.rurdev.usda.gov.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

No new data collection or record keeping requiring Office of Management and Budget (OMB) approval under the Paperwork Reduction Act of 1980 are included in this final rule. The reporting and record keeping burden associated with this rule is approved by the Office of Management and Budget under OMB No. 2506–0148.

I. Background

The Empowerment Zones program confers upon rural distressed American communities the opportunity to take effective action to create jobs and opportunities. The program combines tax benefits with substantial investment of Federal resources and enhanced coordination among Federal agencies.

All communities which complete the nomination process will be strengthened by it; gaining by taking stock of their assets and problems, by creating a vision of a better future, and by structuring a plan for achieving their vision. Local partnerships among community residents, businesses, financial institutions, service providers, neighborhood associations and State and local governments will be formed or strengthened by going through the application process. Communities will be afforded an opportunity to work with these partners in the creation and implementation of a community-based strategic plan.

Communities that were not designated as Empowerment Zones or Enterprise Communities are eligible for certain benefits. Under a separate program directed by the Department of Housing and Urban Development, Community Development Corporations (CDCs) nominated by the locality, or the applicant for the Empowerment Zone or Enterprise Community, will be considered eligible for designation to receive tax preferred contributions from donors. HUD has committed to designating eight rural CDCs for this program. Communities with innovative visions for change will be considered for requested waivers of Federal program regulations, flexible use of existing program funds, and cooperation in meeting essential mandates, even if they did not receive a designation by the Secretary as an Empowerment Zone or Enterprise Community.

Communities that are designated as Enterprise Communities receive a number of benefits. Enterprise Communities are eligible for new Tax-Exempt Facilities Bonds for certain private business activities. States with designated Communities will receive Empowerment Zone/Enterprise Community Social Service Block Grants (EZ/EC SSBG) in the amount of approximately $3 million for each rural Enterprise Community to pass through to each designated area for approved activities identified in the strategic plans. Enterprise Communities receive special consideration in competition for funding under numerous Federal programs, including the new National Service and Community Policing initiatives. The Federal Government will focus special attention on working cooperatively with designated Enterprise Communities to overcome regulatory impediments, to permit flexible use of existing Federal funds, and to assist these Communities in meeting essential mandates.

Communities that are designated as Empowerment Zones receive all of the benefits provided to Enterprise Communities, in addition to other benefits. States with designated rural Empowerment Zones will receive Empowerment Zone/Enterprise Community Social Service Block Grants in the amount of $40 million for each rural Empowerment Zone. Employer Wage Credits for Empowerment Zone residents are provided to qualified employers engaged in trade, business, or human service delivery in designated Empowerment Zones. Businesses are afforded an increased deduction under section 179 of the Internal Revenue Code for qualified investments.

The rural part of the program will be administered by USDA as a Federal-State-local-private partnership, with a minimum of red tape associated with the application process. Applicants must demonstrate the ability to design and implement an effective strategic plan for real opportunities for growth and revitalization, that deal with local problems in a comprehensive way, and must demonstrate the capacity or the commitment to carry out these plans. Development of an effective plan must

also involve the participation of the community affected by the nomination of the rural area, and of the private sector, acting in concert with the State or States and local governments. The plan should be developed in accordance with four key principles, which will also serve as the basis for the selection criteria that will be used to evaluate the plan. These key principles reflect the Secretary's intention that Empowerment Zone and Enterprise Community designations should be based on potential for successful economic and community revitalization as reflected in the strategic planning process, participants in the plan, and the quality of the plan. Poverty, unemployment, and other need factors are critical in determining eligibility for Empowerment Zone or Enterprise Community status, but play a less significant role in the selection process. The four key principles are:

(1) Economic opportunity, including job creation within the community and throughout the region, entrepreneurial initiatives, small business expansion, and training for jobs that offer upward mobility;

(2) Sustainable community development, to advance the creation of livable and vibrant communities through comprehensive approaches that coordinate economic, physical, environmental, community and human development;

(3) Community-based partnerships, involving participation of all segments of the community, including the political and governmental leadership, community groups, health and social service groups, environmental groups, religious organizations, the private and non-profit sectors, centers of learning, other community institutions, and individual citizens; and

(4) Strategic vision for change, which identifies what the community will become and a strategic map for revitalization. The vision should build on assets and coordinate a response to community needs in a comprehensive fashion. It should also set goals and performance benchmarks for measuring progress and establish a framework for evaluating and adjusting the revitalization plan.

State and local governments and economic development corporations that are state chartered may nominate distressed rural areas for designation as Empowerment Zones (which will also permit their consideration for designation as Enterprise Communities), or solely for designation as Enterprise Communities.

Title XIII of the Omnibus Reconciliation Act of 1993 included Empowerment Zones and Enterprise Communities as a new program.

II. Program Description

General

Pursuant to Title XIII of the Omnibus Reconciliation Act of 1993, the Secretary of USDA may designate up to three rural Empowerment Zones and up to thirty rural Enterprise Communities.

Eligibility

To be eligible for designation as a rural Empowerment Zone or Enterprise Community an area must:

(1) Have a maximum population of 30,000;

(2) Be one of pervasive poverty, unemployment, and general distress;

(3) Not exceed one thousand square miles in total land area;

(4) Demonstrate a poverty rate that is not less than:

(a) 20 percent in each census tract or census block numbering area (BNA);

(b) 25 percent in 90 percent of the population census tracts and BNAs within the nominated area;

(c) 35 percent for at least 50 percent of the population census tracts and BNAs within the nominated area;

(5) Be located entirely within no more than three contiguous States; if it is located in more than one State, the area must have one continuous boundary; if located in only one State, the area may consist of no more than three noncontiguous parcels;

(6) If the nominated area consists of noncontiguous parcels, each must independently meet the three poverty requirements;

(7) Be located entirely within the jurisdiction of the unit or units of general local government making the nomination;

(8) Not include any portion of a census-defined central business district unless the poverty rate for each population census tract is at least 35 percent for an Empowerment Zone and 30 percent for an Enterprise Community; and

(9) Not include any portion of an Indian reservation.

Nomination Process

The law requires that areas be nominated by one or more local governments and the State(s) in which a nominated rural area is located. Nominations can be considered for designation only if:

(1) The area meets the eligibility requirements set forth in these rules;

(2) The area is within the jurisdiction of the nominating local government(s) and the State(s);

(3) The local government(s) and State(s) provide assurances that the required strategic plan submitted by the applicant will be implemented;

(4) All information furnished by the nominating local government(s) and State(s) is determined by the Secretary of USDA to be reasonably accurate;

(5) The local government(s) and State(s) certify that no portion of a nominated rural area is already in an Empowerment Zone or Enterprise Community or in an area otherwise nominated for designation; and

(6) The local government(s) and State(s) certify that they possess the legal authority to make the nomination.

The nomination must be accompanied by an application for designation including a strategic plan, which:

(1) Indicates and briefly describes the specific groups, organization and individuals participating in the development of the plan, and describes the history of these groups in the community;

(2) Explains how participants were selected and provides evidence that the participants, taken as a whole, are broadly representative of the racial, cultural and economic diversity of the community;

(3) Describes the role of the participants in the creation and development of the plan and indicates how they will participate in its implementation;

(4) Identifies two or three topics addressed in the plan that caused the most serious disagreements among participants and describes how those disagreements were resolved;

(5) Explains how the community participated in choosing the area to be nominated and why the area was nominated;

(6) Provides evidence that key participants have the capacity or how they will develop the capacity to implement the plan;

(7) Provides a brief explanation of the community's vision for revitalizing the area;

(8) Explains how the vision stimulates economic opportunity, encourages self-sufficiency and promotes sustainable community development;

(9) Identifies key needs of the area and the barriers that restrict the community from achieving its vision, including a description of poverty and general distress, barriers to economic opportunity and development and barriers to human development;

(10) Discusses how the vision is related to the assets and capacities of the area and its surroundings; and

(11) Describes the ways in which the community's approaches to economic

development, social/human services, transportation, housing, sustainable community development, public safety, drug abuse prevention, and educational and environmental concerns will be addressed in a coordinated fashion.

The strategic plan must identify how government resources will be used to support the plan. Specifically, the plan must indicate:

(1) How Social Service Block Grant (SSBG) funds for designated Zones and Communities, tax benefits for designated Zones and Communities, State and local resources, existing Federal resources available to the locality and additional Federal resources believed necessary to implement the strategic plan will be utilized within the Empowerment Zone or Enterprise Community;

(2) The level of commitment necessary to ensure that these resources will be available to the area upon designation; and

(3) The Federal resources being applied for or for which applications are planned.

The plan must identify private resources committed to its implementation, including:

(1) Private resources and support, including assistance from businesses, non-profit organizations and foundations, that are available to be leveraged with public resources; and

(2) Assurances that these resources will be made available to the area upon designation.

The plan must address changes needed in Federal rules and regulations necessary to implement the plan, including:

(1) Specific paperwork or other Federal program requirements that need to be altered to permit effective implementation of the strategic plan; and

(2) Specific regulatory and other impediments to implementing the strategic plan for which waivers are requested, with appropriate citations and an indication whether waivers can be accomplished administratively or require statutory changes.

The plan must demonstrate how State and local governments will reinvent themselves to help implement the plan, by:

(1) Identifying the changes that will be made in State and local organizations, processes and procedures, including laws and ordinances, to facilitate implementation of the plan; and

(2) Explaining how different agencies in State and local governments will work together in new responsive ways to implement the strategic plan.

The plan must provide details as to the manner in which the plan will be implemented and indicate what benchmarks will be used to measure progress, by:

(1) Identifying the specific tasks necessary to implement the plan;

(2) Describing the partnerships that will be established to carry out the plan;

(3) Explaining how the strategic plan will be regularly revised to reflect new information and opportunities; and

(4) Identifying the baselines, benchmarks and goals that will be used in evaluating performance in implementing the plan.

III. Differences Between Final Rule and Interim Rule

This final rule makes appropriate corrections to the January 18, 1994 interim rule. As will be discussed in the following section of this preamble, USDA received several good suggestions and recommendations of matters that the rule should address or expand upon, or terms that should be defined. These changes are largely directed at the nomination process, the eligibility process, the contents of the strategic plans, and evaluations of the strategic plans or policies associated with the use of EZ/EC funds.

The technical changes made by this final rule are largely directed to that section of the rule (§ 25.200(d)) which addresses the use of EZ/EC SSBG funds and therefore are relevant even after the designation process is complete. The following provides a list of editorial/technical changes made to the interim rule by this final rule.

1. In § 25.200 (Nominations by State and local governments), USDA sets forth the procedures for nominations by State and local governments of areas for designation as an Empowerment Zone and/or Enterprise Community. Paragraph (d) of the section addresses the elements of the strategic plan which must be developed as part of the application for designation, and paragraph (d)(12) specifically addresses how the Social Services Block Grant (SSBG) funds for designated Empowerment Zones and Enterprise Communities will be utilized. Several technical errors were made in paragraph (d)(12), and these are as follows:

a. Paragraph (d)(12)(i)(A) discusses the commitment concerning the use of EZ/EC SSBG funds. The rule provides for the commitment to be made by the ''applicant as well as by the State government(s).'' In this paragraph, USDA inadvertently omitted reference to the full range of nominating entities that would have to make this commitment, and only listed ''State governments.'' (Note that § 25.501 provides for nomination by States and local governments and § 25.502 provides for nominations by State-chartered economic development corporations.) Accordingly, the final rule corrects this paragraph to include not only State governments, but local governments and State-chartered economic development corporations. The final rule also explains that the ''services or activities'' referenced in this paragraph are the ''services or activities which can be used to achieve or maintain the goals set forth in paragraph (d)(12).''

b. Paragraph (d)(12)(ii) provides, in error, that Empowerment Zone or Enterprise Community SSBG funds (EZ/EC SSBG funds) may be used to achieve certain goals set forth in the paragraph by ''undertaking one of the below specified options.'' The correct wording should provide that States and local governments may undertake ''one or more'' of the options set forth in the paragraph. One option available to States and local governments for the use of EZ/EC SSBG funds was inadvertently omitted from the interim rule. This option provides for the use of EZ/EC SSBG funds to promote the economic independence of low-income residents, such as capitalizing revolving or micro-enterprise loan funds for their benefit.

c. In paragraph (d)(12)(ii), the interim rule provides that EZ/EC SSBG funds ''may'' be used to maintain the goals set forth in paragraph (d)(12). The rule should have stated that the EZ/EC SSBG funds ''must'' be used to maintain the goals set forth in paragraph (d)(12), and that the goals ''may be achieved'' by undertaking the program options listed in (d)(12)(ii).

d. The interim rule inadvertently omitted the paragraph that provides guidance concerning how designated Empowerment Zones and Enterprise Communities may meet the goals specified in paragraph (d)(12). This paragraph does not dictate how the goals may be met, but offers guidance as to how they may be met. This rule makes this correction by adding a new paragraph (iii), and by redesignating the succeeding paragraphs accordingly.

e. In paragraph (d)(12)(v) of the interim rule, the Department provided that the State must obligate EZ/EC SSBG funds in accordance with the strategic plan within two years from the ''date of designation of the Empowerment Zone or Enterprise Community.'' This time frame is incorrect. This paragraph should have provided that the State must obligate funds two years from the date ''the funds are paid to the State.'' This paragraph is also corrected by this

document to add that ''funds not obligated must be remitted to the Secretary of Health and Human Services.'' This sentence was inadvertently dropped in the rule text.

f. Two requirements pertaining to the strategic plan were inadvertently omitted from paragraph (d)(12). One requirement provides that the strategic plan must indicate how the EZ/EC SSBG funds will be invested and used for the period of designation, and the second provides that the strategic plan must provide for periodic reporting of information by the relevant State. These requirements are now set forth in (d)(12)(vii) and (viii).

2. In § 25.401 (Periodic Performance Reviews), USDA sets forth guidelines for evaluation of progress in the implementation of strategic plans. This section is expanded to include responsibilities of implementation entities.

3. Editorial corrections are as follows:

a. In § 25.300(b)(1) the second sentence is deleted; ''and;'' is added.

b. In § 25.302 the numeral '3' is replaced by ''three''.

c. In § 25.401 ''important'' is replaced by ''impartial''.

d. In § 25.504 (b) the sentence ''On a case basis, the Secretary will grant requests for waiver from the above definition of ''rural'' upon a showing of good cause'', ''above'' is deleted and ''stated in paragraph (2) of this section'', is added following the word ''rural''. In the next sentence, ''the above subsection'' is deleted and ''the definition in paragraph (a) of this section'' is added following the word ''satisfy''.

The designation of Rural Development Administration has been changed to Rural Business and Cooperative Development Service.

IV. The Public Comments

General Comments

The January 18, 1994 interim rule provided for a 30-day public comment period. The public comment period expired on February 17, 1994. Comments, however, were accepted through March 1, 1994. By this date, a total of 36 comments had been received. The commenters consisted of the Federal agencies, labor unions, (insert ''private citizens'') State and local jurisdictions, state legislators and non-profit organizations. USDA received several good suggestions and recommendations from commenters that will be adopted or considered in any future rulemaking. Other suggestions, although of equal merit, could not be adopted given the current statutory framework of the EZ/EC Program. Other requests for changes or clarification were determined to be adequately addressed by the January 18, 1994 interim rule. The following provides a summary of the significant issues raised by public commenters and USDA's response to these issues.

Technical Corrections

Comment: Five commenters highlighted inadvertent omissions in the text of the interim rule regarding the use of EZ/EC SSBG funds.

Response: Appropriate corrections were adopted in this final rule.

Business Non-Relocation

Comment: The AFL–CIO makes the point that public funds should not be used to encourage plant relocations from one location to another and that the Federal government should not be a participant in state and local programs which only shift employment from one location to another. The letter called for strengthening regulations by placing the responsibility on the communities to show that relocations did not occur and that jobs created in the community are not at the expense of another location. The following recommendations were made regarding enforcement of the non-relocation provision: (1) Require firms to certify that they did not relocate from another area; (2) require public assistance to firms be paid back if plant relocations occur; (3) require employers to list annual employment at plant locations so that relocations could be monitored. Commenters also recommend revocation of EZ/EC designation if job relocations occur in the approved zones. The final comment sought the addition of labor unions to the list among segments of the community that could form community-based partnerships.

Response: The issue of non-relocation of business received consideration early in the developmental stages of the EZ/EC program. The regulations include a prohibition against business relocation by prohibiting any activity in the strategic plan to assist business relocation to the nominated area from an area outside the nominated area. According to the Empowerment Zone statute (26 U.S.C. 1391 (f)(2)(F)), expansion of an existing business entity is permitted if (1) it will not result in a decrease in employment in any area where the company currently conducts business; and (2) there is no reason to believe that a new branch is being established with the intention of closing down the existing business in another area. The issue of non-relocation can be dealt with in the monitoring and evaluation process.

Comment: One commenter requested clarification on the issue of relocation of foreign plants/entities to Empowerment Zones or Enterprise Communities.

Response: The statute does not distinguish between foreign and domestic businesses in the prohibition against business relocation.

Comments on Census Data Calculations

Comment: One commenter recommended that where calculations are made to determine eligibility, numbers should be rounded off and in a direction to favor the applicant. This recommendation would allow readjustment of the poverty threshold in the case of less than 10 census tracts and rounding off up to 5 percentage points.

Response: USDA disagrees with the commenter. Section 25.103 b(4) states: ''In making the calculations required by this section, the Secretary shall round all fractional percentages of one-half percentage point or more up to the next highest whole percentage point figure''. There is no authority for special mathematical rounding of the number of census tracts when there are less than 10 tracts (BNAs) identified.

Comments on Census Tracts and Census Tract Definitions

Comment: Nineteen commenters requested the use of census block data in lieu of census tract data and to broaden the definition of population census tracts.

Response: USDA is unable to adopt the suggestions of the commenters. The statute requires the use of the most recent decennial census data available. The regulations which govern designation of Empowerment Zones and Enterprise Communities (part 25, subpart A, § 25.101(a)) indicate that the data employed to determine eligibility is based on the 1990 Census and from information published by the Bureau of the Census and the Bureau of Labor Statistics. Census tracts or block numbering areas are used to satisfy these requirements. The census data is reported in terms of census tracts or block number areas and not for other graphical units.

Comment: Three commenters indicated that the statutory requirement to limit the area of nominated areas to 20 square miles for urban areas and 1000 square miles for rural areas imposed undue difficulties for many areas of the West and Southwest.

Response: USDA is unable to adopt the suggestions of the commenters. The statute requires the size limitation and

does not permit exclusions as suggested by the commenters.

Comments on the Definition of Rural Area

Comment: Several comments involved the definition of a 'rural area'. The current definition of rural in the regulation excludes communities where predominantly rural populations reside within Metropolitan Areas (MA) or where more than 50 percent of the population resides within a designated Metropolitan Area. Metropolitan Area does not have an exact definition in the Bureau of the Census Dictionary of Geographical Terms. Tracts within MA's are restricted from applying unless they are contiguous to and part of a multicounty application.

Response: No rule changes are required. Statute Section 1393(a)(2)(B) and § 25.504(b) of part 25 give the Secretary sufficient discretionary power to define a rural area.

General Comments on the Rule

Comment: Apparent conflict between the EZ/EC rules and the Cash Management Act of 1990. Concern was expressed that while, under the Cash Management Act, States drawing Federal monies must make expenditures within three days of receipt or pay interest, EZ/EC SSBG funds are transferred to the states to be passed on to the implementing entities and that the State has two years to obligate these funds to the implementing entities.

Response: Department of Health and Human Services has advised that the Cash Management Act does not apply to SSBG funds.

Comment: The Governor of Texas and the Texas Department of Commerce requested that the application deadline be extended to six months from the issue date of the Interim Rule to allow time to prepare comprehensive applications.

Response: USDA disagrees with the commenters. Extension of the deadline would penalize States that have allocated funds and technical assistance in order to meet the June 30, 1994 deadline.

Comment: One commenter stated that the interim rule as a whole did not adequately address the needs of extremely low-income persons.

Response: USDA disagrees with the commenter. The eligibility for designation as an Empowerment Zone or Enterprise Community requires a significant level of poverty, and the strategic plan is required to include various descriptions of how the nominated area would address the need of low-income persons, for example, through the creation of economic opportunities, home ownership, education or other route to economic independence for low-income families, youth and other individuals. (See § 25.200.)

Comment: One commenter stated that the definition of ''State-chartered economic development corporation'' was not very clear.

Response: The statute defined this term, and the rule simply incorporated the statutory definition.

Comment: Three commenters stated that the strategic plan principle concerning employment should emphasize job creation for low-income persons. Another commenter stated that the strategic plan principle concerning employment should emphasize job creation for minority businesses.

Response: USDA agrees with the commenters and such emphasis will be considered in future rulemaking that may be necessary for any additional rounds of designations that may be authorized.

Comment: One commenter raised the concern of possible channeling of EDA assistance from Economic Development Districts, which may not qualify the EZ/EC designation, to designated EZ/EC areas.

Response: The intent of the legislation is to provide assistance to distressed communities by encouraging creation of jobs and opportunities for local development as part of a Federal-State-local and private-sector partnership. Although this effort addresses 'local' issues within each community, the context of revitalization applies nationally. Therefore diversion of programmed assistance from one distressed area to the designated EZ/EC communities is not consistent with the purpose of the EZ/EC program.

Comment: One commenter stated that labor union should be added to the list among the segments of the community that could form Community-based Partnerships.

Response: While labor unions were not named specifically, they are included under the regulation. Subpart C (Nomination Procedure) § 25.200 Paragraph (c)(3) states that ''Community based partnerships, involve the participation of all segments of the community groups, health and social service groups, environmental groups, religious organizations, the private and non-profit sectors, centers of learning, and other community institutions and individual citizens.'' The organizations listed are examples of the kinds of partnerships that could be formed by communities.

Comment: One commenter addressed issues related to the use of certain statistics in the determination of applicant eligibility for the EZ/EC program.

Response: These suggestions will be considered in any future rulemaking needed for a new round of designation.

Comment: Two commenters stated that the rule should allow designated communities to use funds and other resources identified in the strategic plans for properties directly adjacent to the boundaries of the designated census tracts.

Response: The regulation is clear on the use of EZ/EC SSBG funds for approved EZ/EC activities identified in the community strategic plans. A issue of this type can be addressed during the approval process.

V. Other Matters

National Environmental Policy Act

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' It is the determination of USDA that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance the National Environmental Policy Act of 1969, Pub. L. 91–190, an Environmental Impact Statement is not required.

Executive Order 12866, Regulatory Planning and Review

This rule was reviewed and approved by the Office of Management and Budget as a significant rule, as that term is defined in Executive Order 12866, which was signed by the President on September 30, 1993. The economic analysis required by Executive Order 12866 will be retained in the public file with the Department's Rule Docket Clerk.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Act is intended to encourage Federal agencies to utilize innovative administrative procedures in dealing with individuals, small businesses, small organizations, and small governmental bodies that would otherwise be unnecessarily adversely affected by Federal regulations. To the extent that this rule affects those entities, its purpose is to reduce any disproportionate burden by providing for the waiver of regulations

and by affording other incentives directed toward a positive economic impact. Therefore, no regulatory flexibility analysis under the Act is necessary.

Executive Order 12611, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12611, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The purpose of this rule is to provide a cooperative atmosphere between the Federal Government and the States and local governments, and to reduce any regulatory burden imposed by the Federal Government that impedes the ability of State and local governments to solve pressing economic, social, and physical problems in their communities.

List of Subjects in 7 CFR Part 25

Community development, Economic development, Empowerment zones, Enterprise communities, Housing, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

In accordance with the reasons set out in the preamble, title 7, subtitle A, part 25 of the Code of Federal Regulations is revised to read as follows:

1. Title 7, subtitle A is amended by revising part 25 to read as follows:

PART 25—RURAL EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES

Sec.

Subpart A—General Provisions

25.1 Applicability and scope.
25.2 Objective and purpose.
25.3 Definitions.
25.4 Secretarial review and designation.
25.5 Waivers.

Subpart B—Area Requirements

25.100 Eligibility requirements and data usage.
25.101 Data utilized for eligibility determinations.
25.102 Tests of pervasive poverty, unemployment and general distress.
25.103 Poverty rate.

Subpart C—Nomination Procedure

25.200 Nominations by State and local governments.
25.201 Evaluating the strategic plan.
25.202 Submission of nominations for designation.

Subpart D—Designation Process

25.300 USDA action and review of nominations for designation.
25.301 Selection factors for designation of nominated rural areas.
25.302 Number of Rural Empowerment Zones and Enterprise Communities.

Subpart E—Post-Designation Requirements

25.400 Reporting.
25.401 Periodic performance reviews.
25.402 Validation of designation.
25.403 Revocation of designation.

Subpart F—Special Rules

25.500 Indian reservations.
25.501 Governments.
25.502 Nominations by economic development corporations.
25.503 Use of census data.
25.504 Rural areas.

Authority: 5 U.S.C. 301; 26 U.S.C. 1391 et seq.

Subpart A—General Provisions

§ 25.1 Applicability and scope.

(a) *Applicability.* This part establishes policies and procedures applicable to rural Empowerment Zones and Enterprise Communities, authorized under the Omnibus Budget Reconciliation Act of 1993, title XIII, subchapter C, part I (Pub. L. 103–66, approved August 10, 1993), which amended the Internal Revenue Code by adding a new subchapter U, relating to the designation and treatment of Empowerment Zones and Enterprise Communities.

(b) *Scope.* This part contains provisions relating to area requirements, the nomination process for rural Empowerment Zones and rural Enterprise Communities, and the designation of these Zones and Communities by USDA. Provisions dealing with the nominations and designation of urban Empowerment Zones and Enterprise Communities are promulgated by the United States Department of Housing and Urban Development (HUD). USDA and HUD will consult in all cases in which nominated areas possess both rural and urban characteristics and will utilize a flexible approach in determining the appropriate designation.

§ 25.2 Objective and purpose.

The purpose of this part is to provide for the establishment of Empowerment Zones and Enterprise Communities in rural areas, to stimulate the creation of new jobs, particularly for the disadvantaged and long-term unemployed, and to promote revitalization of economically distressed areas, primarily by providing or encouraging:

(a) Coordination of economic, human, community, and physical development plans and related activities at the local level;

(b) Local partnerships fully involving affected communities and local institutions and organizations in developing and implementing a strategic plan for any nominated rural Empowerment Zone or Enterprise Community;

(c) Tax incentives and credits; and

(d) Empowerment Zone/Enterprise Community Social Service Block Grant (EZ/EC SSBG) funds.

§ 25.3 Definitions.

As used in this part—

Applicant means the lead entity that has prepared and will implement the community's strategic plan, pursuant to the provisions of § 25.200(c) of this part, for comprehensive economic, human, community, and physical development within the area; such an entity may include, but is not limited to, state governments, local governments, regional planning agencies, non-profit organizations, community-based organizations, or a partnership of community members and other entities.

Designation means the process by which the Secretary designates rural areas as Empowerment Zones or Enterprise Communities eligible for tax incentives and credits established by subchapter U of the Internal Revenue Code (26 U.S.C. 1391 et seq.), EZ/EC SSBGS as established by the Department of Health and Human Services (HHS), and for consideration for programs of Federal assistance.

Empowerment Zone means a rural area so designated by the Secretary pursuant to this part. Up to three such zones may be designated.

Enterprise Community means a rural area so designated by the Secretary pursuant to this part. Up to 30 such communities may be designated.

EZ/EC SSBG Funds means grants made by the Secretary of HHS to States containing Empowerment Zones and Enterprise Communities whose strategic plans are qualified plans as defined in section 13761 of the Omnibus Budget Reconciliation Act of 1993.

Indian reservation means a reservation as defined in section 3(d) of the Indian Financing Act of 1974 (25 U.S.C. 1452(d)) or section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(10)).

Local government means any county, city, town, township, parish, village, or other general purpose political subdivision of a State, and any combination of these political

subdivisions which is recognized by the Secretary.

Nominated area means an area which is nominated by one or more local governments and the State or States in which it is located for designation pursuant to this part.

Population census tract means a census tract, or, if census tracts are not defined for the area, a block numbering area (BNA).

Poverty means the number of persons listed as being in poverty in the 1990 Census.

Revocation of designation means the process by which the Secretary may revoke the designation of an area as an Empowerment Zone or Enterprise Community pursuant to § 25.403 of this part.

Rural area means any area defined pursuant to § 25.504 of this part.

Secretary means the Secretary of Agriculture.

State means any State in the United States.

Strategic plan means a strategy developed by the applicant, with the participation and commitment of local governments, State government(s), private sector, community members and others, pursuant to the provisions of § 25.200(c) of this part. The plan must include written commitments from the local governments and State(s) that they will adhere to the strategy.

USDA means the U.S. Department of Agriculture.

§ 25.4 Secretarial review and designation.

(a) *Designation.* The Secretary will review applications for the designation of nominated rural areas to determine the effectiveness of the strategic plans submitted by applicants in accordance with § 25.200 of this part. The Secretary will designate up to three rural Empowerment Zones and up to 30 rural Enterprise Communities.

(b) *Period of designation.* The designation of a rural area as an Empowerment Zone or Enterprise Community shall remain in full effect during the period beginning on the date of designation and ending on the earliest of:

(1) The close of the tenth calendar year beginning or after the date of designation;

(2) The termination date designated by the State and local governments in their application for nomination; or

(3) The date the Secretary revokes or modifies the designation, in accordance with § 25.402 or § 25.403 of this part.

§ 25.5 Waivers.

The Secretary may waive any provision of this part in any particular case subject only to statutory limitations, for good cause, where it is determined that application of the requirement would produce a result adverse to the purpose and objectives of this part.

Subpart B—Area Requirements

§ 25.100 Eligibility requirements and data usage.

Eligibility Criteria. A nominated rural area may be eligible for designation pursuant to this part only if the area:

(a) Has a maximum population of 30,000;

(b) Is one of pervasive poverty, unemployment, and general distress, as described in § 25.102 of this part;

(c) Does not exceed one thousand square miles in total land area;

(d) Be located entirely within no more than three contiguous States; if it is located in more than one State, the area must have one continuous boundary; if located in only one State, the area may consist of up to three noncontiguous parcels;

(e) Is located entirely within the jurisdiction of the unit or units of general local government making the nomination;

(f) Does not include any portion of a central business district, as this term is used in the most recent Census of Retail Trade, unless the individual poverty rate of each population census tract in the district is not less than 35 percent for an Empowerment Zone and 30 percent for an Enterprise Community; and

(g) Does not include any area within an Indian reservation.

§ 25.101 Data utilized for eligibility determinations.

(a) *Source of data.* The data to be employed in determining eligibility pursuant to the criteria described in § 25.102 of this part shall be based on the 1990 Census, and from information published by the Bureau of Census and the Bureau of Labor Statistics. The data shall be comparable in point or period of time and methodology employed.

(b) *Use of statistics on boundaries.* The boundary of a rural area nominated for designation as an Empowerment Zone or Enterprise Community must coincide with the boundaries of census tracts, or, where tracts are not defined, with block numbering areas.

§ 25.102 Tests of pervasive poverty, unemployment and general distress.

(a) *Pervasive poverty.* Conditions of poverty must be reasonably distributed throughout the entire nominated area. The degree of poverty shall be demonstrated by citing available statistics on low-income population and levels of public assistance. Poverty is demonstrated by poverty data from the 1990 census.

(b) *Unemployment.* The degree of unemployment shall be demonstrated by the provision of information on the number of persons unemployed, underemployed (those with only a seasonal or part-time job) or discouraged workers (those capable of working but who have dropped out of the labor market—hence are not counted as unemployed), increase in unemployment rate, job loss, plant or military base closing, or other relevant unemployment indicators having a direct effect on the nominated area.

(c) *General distress.* General distress shall be evidenced by describing adverse conditions within the nominated area other than those of pervasive poverty and unemployment. Below average or decline in per capita income, earnings per worker, per capita property tax base, average years of school completed; outmitigration and population decline from 1980–1990, and a high or rising incidence of crime, narcotics use, abandoned housing, deteriorated infrastructure, school dropouts and illiteracy are examples of appropriate indicators of general distress. The data and methods used to produce such indicators that are used to describe general distress must all be stated.

§ 25.103 Poverty rate.

(a) *General.* Eligibility of an area on the basis of poverty shall be established in accordance with the following criteria:

(1) In each census tract within a nominated area, the poverty rate shall be not less than 20 percent; and

(2) For at least 90 percent of the population census tracts within the nominated area, the poverty rate shall not be less than 25 percent; and

(3) For at least 50 percent of the population census tracts within the nominated area, the poverty rate shall be not less than 35 percent.

(b) *Special rules relating to the determination of poverty rate.*—(1) *Census tracts with no population.* Census tracts with no population shall be treated as having a poverty rate that meets the standards of paragraphs (a)(1) and (a)(2) of this section, but shall be treated as having a zero poverty rate for purposes of applying paragraph (a)(3) of this section.

(2) *Census tracts with populations of less than 2,000.* A population census tract with a population of less than 2,000 shall be treated as having a poverty rate that meets the requirements

of paragraphs (a)(1) and (a)(2) of this section if more than 75 percent of the tract is zone for commercial or industrial use.

(3) *Adjustment of poverty rates for Enterprise Communities.* For Enterprise Communities only, the Secretary has the discretion to reduce by 5 percentage points one of the following thresholds for not more than 10 percent of the census tracts, or, if fewer, five population census tracts in the nominated area:

(i) The 20 percent threshold in paragraph (a)(1) of this section;

(ii) The 25 percent threshold in paragraph (a)(2) of this section; and

(iii) The 35 percent threshold in paragraph (a)(3) of this section;

Provided that, the Secretary may in the alternative reduce the 35 percent threshold by 10 percentage points for three population census tracts.

(4) *Rounding up of percentages.* In making the calculations required by this section, the Secretary shall round all fractional percentages of one-half percentage point or more up to the next highest whole percentage point figure.

(c) *Noncontiguous areas.* There can be no more than 3 noncontiguous areas if the nominated area is located within one state; noncontiguous areas are not allowed in the multistate area. Each such parcel must separately meet the poverty criteria set forth in this section.

(d) *Areas not within census tracts.* In the case of an area that does not have population census tracts, the block numbering area shall be used for purposes of determining poverty rates.

Subpart C—Nomination Procedure

§ 25.200 Nominations by State and local governments.

(a) *Nomination criteria.* One or more local governments and the State or States in which an area is located must nominate such area for designation as an Empowerment Zone or Enterprise Community, if:

(1) The rural area meets the requirements for eligibility described in § 25.100 and § 25.103 of this part;

(2) The rural area is entirely within the jurisdiction of the nominating State or States and local government(s); such governments must have the authority to nominate the area for designation and provide written assurances satisfactory to the Secretary that the strategic plan described in paragraph (c) of this section will be implemented;

(3) All information furnished by the nominating State(s) and local government(s) is determined by the Secretary to be reasonably accurate; and

(4) The State(s) and local government(s) certify that no portion of the area nominated is already included in an Empowerment Zone or Enterprise Community under this Act or in an area otherwise nominated to be designated under this section.

(b) *Nomination for designation.* No rural area may be considered for designation pursuant to subpart D of this part unless the application for designation:

(1) Demonstrates that the nominated rural area satisfies the eligibility criteria set forth at § 25.100 of this part;

(2) Includes a strategic plan, as described in paragraph (c) of this section; and

(3) Includes such other information as may be required by USDA in a Notice Inviting Applications, to be published in the **Federal Register**.

(c) *Strategic plan.* Each application for designation must be accompanied by a strategic plan, which must be developed in accordance with four key principles that will be utilized to evaluate the plan. These key principles are:

(1) Economic opportunity, including job creation within the community and throughout the region, entrepreneurial initiatives, small business expansion, and training for jobs that offer upward mobility;

(2) Sustainable community development, to advance the creation of livable and vibrant communities through comprehensive approaches that coordinate economic, physical, environmental, community and human development;

(3) Community-based partnerships, involving the participation of all segments of the community, including the political and governmental leadership, community groups, health and social service groups, environmental groups, religious organizations, the private and non-profit sectors, centers of learning, and other community institutions and individual citizens; and

(4) Strategic vision for change, which identifies what the community will become and a strategic map for revitalization. The vision should build on assets and coordinate a response to community needs in a comprehensive fashion. It should also set goals and performance benchmarks for measuring progress and establish a framework for evaluating and adjusting the revitalization plan.

(d) *Elements of strategic plan.* The strategic plan should:

(1) Indicate and briefly describe the specific groups, organizations, and individuals participating in its production, and describe the history of these groups in the community;

(2) Explain how participants were selected and provide evidence that the participants, taken as a whole, are broadly representative of the entire community;

(3) Describe the role of the participants in the creation and development of the plan and indicate how they will participate in its implementation;

(4) Identify two or three topics addressed in the plan that caused the most serious disagreements among participants and describe how those disagreements were resolved;

(5) Explain how the community participated in choosing the area to be nominated and why the area was nominated;

(6) Provide evidence that key participants have the capacity to implement the plan;

(7) Provide a brief explanation of the community's vision for revitalizing the area;

(8) Explain how the vision creates economic opportunity, encourages self-sufficiency and promotes community development;

(9) Identify key community goals and the barriers that restrict the community from achieving such goals, including a description of poverty and general distress, barriers to economic opportunity and development, and barriers to human development;

(10) Discuss how the vision is related to the assets and needs of the area as well as to the surrounding community;

(11) Describe the ways in which the community's approaches to economic development, social/human services, transportation, housing, community development, public safety, drug abuse prevention and educational and environmental concerns will be addressed in a coordinated fashion; and explain how these linkages support the community's vision;

(12) Indicate how all EZ/EC SSBG funds for the designated Empowerment Zone or Enterprise Community will be utilized.

(i) In doing so, the strategic plan shall provide the following information:

(A) A commitment by the applicant, as well as by the nominating state-chartered economic development corporation or State government(s), and local government(s), that the EZ/EC SSBG funds will be used to supplement, not replace, other Federal or non-Federal funds available for financing services or activities which can be used to achieve or maintain the goals outlined in paragraph (d)(12)(ii) of this section;

(B) a description of the entities that will administer the EZ/EC SSBG funds;

(C) a certification by such entities that they will provide periodic reports on the use of the EZ/EC SSBG funds; and

(D) a detailed description of all the activities to be financed with the EZ/EC SSBG funds and how all such funds will be allocated.

(ii) The EZ/EC SSBG funds must be used to achieve or maintain the following goals through undertaking one of the below specified program options. The goals may be achieved by undertaking one or more of the following program options:

(A) The goal of economic self-support to prevent, reduce or eliminate dependencies, through one of the following program options:

(*1*) Funding community and economic development services focused on disadvantaged adults and youths, including skills training, transportation services and job, housing, business, and financial management counseling;

(*2*) Supporting programs that promote home ownership, education or other routes to economic independence for low-income families, youths, and other individuals;

(*3*) Assisting in the provision of emergency and transitional shelter for disadvantaged families, youths, and other individuals;

(B) The goal of self-sufficiency, including reduction or prevention of dependencies, through one of the following program options:

(*1*) Providing assistance to non-profit organizations and/or community and junior colleges that provide disadvantaged individuals with opportunities for short-term training courses in entrepreneurial, self employment, and other skills that promote individual self-sufficiency, and the interest of the community;

(*2*) Funding programs to provide training and employment for disadvantaged adults and youths in construction, rehabilitation or improvement of affordable housing, public infrastructure and community facilities; and,

(C) The goal of prevention or amelioration of the neglect, abuse, or exploitation of children and/or adults unable to protect themselves; and, where appropriate, the goal of preservation or rehabilitation of families, through one or more of the following program options:

(*1*) Providing support for residential or non-residential drug and alcohol prevention and treatment programs that offer comprehensive services for pregnant women, and mothers, and their children;

(*2*) Establishing programs that provide activities after school hours, including keeping school buildings open during evenings and weekends for mentor and study programs.

(iii) Designated Empowerment Zones and Enterprise Communities may work to achieve or maintain the goals outlined in paragraphs (d)(12)(ii)(A) and (B) of this section by using EZ/EC SSBG funds to capitalize revolving or micro-enterprise loan funds which benefit low-income residents of the designated Empowerment Zones or Enterprise Communities. Similarly, grantees may work to achieve or maintain the goals outlined in paragraphs (d)(12)(ii)(A) and (B) of this section by using the EZ/EC SSBG funds to create jobs and promote economic opportunity for low-income families and individuals through matching grants, loans, or investments in community development financial institutions.

(iv) If the applicant intends to use the EZ/EC SSBG funds for program options not included in paragraph (d)(12) of this section, the strategic plan must indicate how the proposed activities meet the goals set forth in paragraph (d)(12) (ii)(B) of this section, and the reasons the any approved program options were not pursued.

(v) To the extent that the EZ/EC SSBG funds are used for the program options included in paragraph (d)(12) (ii)(B) of this section, the applicant may use EZ/EC SSBG funds for the following activities, in addition to those activities permitted by § 2005 of the Social Security Act (42 USC 1397d):

(A) To purchase or improve land or facilities;

(B) To make cash payments to individuals for subsistence or room and board;

(C) To make wage payments to individuals as a social service;

(D) To make cash payments for medical care; and

(E) To provide social services to institutionalized persons.

(vi) The State must obligate the EZ/EC SSBG funds to in accordance with the strategic plan within 2 years from the date of payment to the state, or remit the unobligated funds to the Secretary of Health and Human Services (HHS).

(vii) The Strategic Plan must indicate how the EZ/EC SSBG funds will be invested and used for the 10 year period of designation. The EZ/EC SSBG funds may be used to promote economic independence for low-income residents, such as capitalizing revolving or micro-enterprise loan funds for the benefit of residents. The EZ/EC SSBG funds may also be used to create jobs and promote economic opportunity for low-income families and individuals through matching grants, loans, or investments in community development financial institutions.

(viii) The strategic plan must indicate how all the EZ/EC SSBG funds will be used or invested for the period of designation of the Empowerment Zone or Enterprise Community.

(ix) The strategic plan must provide for periodic reporting of information by the relevant State.

(13) Indicate how tax benefits for designated zones and communities, State and local resources, existing Federal resources available to the locality and additional Federal resources believed necessary to implement the strategic plan will be utilized within the Empowerment Zone or Enterprise Community;

(14) Indicate a level of commitment necessary to ensure that these resources will be available to the area upon designation;

(15) Identify the Federal resources applied for or for which applications are planned;

(16) Identify private resources and support, including assistance from businesses, non-profit organizations, and foundations, which are available to be leverage with public resources; and provide assurances that these resources will be made available to the area upon designation.

(17) Identify changes requested in Federal rules and regulations necessary to implement the plan, including specific paperwork or other Federal program requirements that must be altered to permit effective implementation of the strategic plan;

(18) Identify specific regulatory and other impediments to implementing the strategic plan for which waivers are requested, with appropriate citations and an indication whether waivers can be accomplished administratively or require statutory changes;

(19) Demonstrate how State and local governments will reinvent themselves to help implement the plan, by identifying changes that will be made in State and local organizations, processes and procedures, including laws and ordinances;

(20) Explain how different agencies in State and local governments will work together in new responsive ways to implement the strategic plan;

(21) Identify the specific tasks necessary to implement the plan;

(22) Described the partnerships that will be established to carry out the plan;

(23) Explain how the plan will be regularly revised to reflect new information and opportunities; and

(24) Identify baselines, benchmarks and goals that will be used in evaluating performance in implementing the plan.

(e) *Prohibition against business relocation.* The strategic plan may not include any action to assist any establishment in relocating from an area outside the nominated area to the nominated area, except that assistance for the expansion of an existing business entity through the establishment of a new branch, affiliate, or subsidiary is permitted, if:

(1) The establishment of a new branch affiliate or subsidiary will not result in a decrease in employment in the area of original location or in any other area where the existing business entity conducts business operations, and

(2) There is no reason to believe that the new branch, affiliate, or subsidiary is being established with the intention of closing down the operations of the existing business entity conducts business operations.

(f) *Implementation of strategic plan.* The strategic plan may be implemented by the State government(s), local governments, regional planning agencies, non-profit organizations, community-based organizations, and/or other nongovernmental entities. Activities included in the plan may be funded from any source, Federal, State, local, or private, which agrees to provide assistance to the nominated area.

(g) *Elements of the strategic plan.* A strategic plan may include, but is not limited to, activities that address:

(1) Economic problems, through measures designed to create employment opportunities; support business startup or expansion; or development of community institutions;

(2) Human concerns, through the provision of social services, such as rehabilitation and treatment programs or the provision of training, education or other services within the affected areas;

(3) Community needs, such as the expansion of housing stock and homeownership opportunities, efforts to reduce homelessness, to promote fair housing and equal opportunity, to reduce and prevent crime and improve security in the area; and

(4) Physical improvements, such as the provision or improvement of public infrastructure, or the provision or improvement of recreational, transportation, or other public services within the affected area.

§ 25.201 Evaluating the strategic plan.

The strategic plan will be evaluated for effectiveness as part of the designation process for nominated rural areas described in § 25.301 of this part. On the basis of this evaluation, USDA may request additional information pertaining to the plan and the proposed area and may, as part of that request, suggest modifications to the plan, proposed area, or term that would enhance its effectiveness. The effectiveness of the strategic plan will be determined in accordance with the four key principles set forth in § 25.200(c) of this part. USDA will review each plan submitted in terms of the four equally weighted key principles, and of such other elements of these key principles as are appropriate to address the opportunities and problems of each nominated area, which may include:

(a) *Economic opportunity.* (1) The extent to which businesses, jobs, and entrepreneurship will increase within the zone or community;

(2) The extent to which residents will achieve a real economic stake in the zone or community;

(3) The extent to which residents will be employed in the process of implementing the plan and in all phases of economic and community development;

(4) The extent to which residents will be linked with employers and jobs throughout the entire area and the way in which residents will receive training, assistance, and family support to become economically self-sufficient;

(5) The extent to which economic revitalization in the zone or community interrelates with the broader regional economies; and

(6) The extent to which lending and investment opportunities will increase within the zone or community through the establishment of mechanisms to encourage community investment and to create new economic growth.

(b) *Sustainable community development*—(1) *Consolidated planning.* The extent to which the plan is part of a larger strategic community development plan for the nominating localities and is consistent with broader regional development strategies;

(2) *Public safety.* The extent to which strategies such as community policing will be used to guarantee the basic safety and security of persons and property within the zone or community;

(3) *Amenities and design.* The extent to which the plan considers issues of design and amenities that will foster a sustainable community, such as open spaces, recreational areas, cultural institutions, transportation, energy, land and water uses, waste management, environmental protection and the vitality of life of the community;

(4) *Sustainable development.* The extent to which economic development will be achieved in a manner consistent that protects pubic health and the environment;

(5) *Supporting families.* The extent to which the strengths of families will be supported so that parents can succeed at work, provide nurture in the home, and contribute to the life of the community;

(6) *Youth development.* The extent to which the development of children, youth, and young adults into economically productive and socially responsible adults will be promoted, and the extent to which young people will be provided with the opportunity to take responsibility for learning the skills, discipline, attitude, and initiative to make work rewarding.

(7) *Education goals.* The extent to which schools, religious organizations, non-profit organizations, for-profit enterprises, local governments and families will work cooperatively to provide all individuals with he fundamental skills and knowledge they need to become active participants and contributors to their community, and to succeed in an increasingly competitive global economy;

(8) *Affordable housing.* The extent to which a housing component, providing for adequate safe housing and ensuring that all residents will have equal access to that housing is contained in the strategic plan;

(9) *Drug abuse.* The extent to which the plan addresses levels of drug abuse and drug-related activity through the expansion of drug treatment services, drug law enforcement initiatives, and community-based drug abuse education programs; and

(10) *Equal opportunity.* The extent to which the plan offers an opportunity for diverse residents to participate in the rewards and responsibilities of work and service. The extent to which the plan ensures that no business within a nominated zone or community will directly or through contractual or other arrangements subject a person to discrimination on the basis of race, color, national origin, gender, handicap or age in its employment practices, including recruitment, recruitment advertising, employment, layoff, termination, upgrading, demotion, transfer, rates of pay or the forms of compensation, or use of facilities. Applicants must comply with the provisions of Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, as implemented by USDA.

(c) *Community-based partnerships*——(1) *Community partners.* The extent to which residents of the strategic plan and their commitment to implementing it. The extent to which community-based organizations in the nominated area have participated in the development of

the nominated area have participated in the development of the plan, and their record of success measured by their achievements and support for undertakings within the nominated area:

(2) *Private and non-profit organizations as partners.* The extent to which partnership arrangements include commitments from private and non-profit organizations, including corporations, utilities, banks and other financial institutions, and educational institutions supporting implementation of the strategic plan;

(3) *State and local government partners.* The extent to which State(s) and local governments are committed to providing support to the strategic plan, including their commitment to ''reinventing'' their roles and coordinating programs to implement the strategic plan; and

(4) *Permanent implementation and evaluation structure.* The extent to which a responsible and accountable implementation structure or process has been created to ensure that the plan is successfully carried out and that improvements are made throughout the period of the zone or community's designation.

(d) *Strategic vision for change.*— (1) *Goals and coordinated strategy.* The extent to which the strategic plan reflects a projection for the community's revitalization which links economic, human, physical, community development and other activities in a mutually reinforcing, synergistic way to achieve ultimate goals;

(2) *Creativity and innovation.* The extent to which the activities proposed in the plan are creative, innovative and promising and will promote the civic spirit necessary to revitalize the nominated area;

(3) *Building on assets.* The extent to which the vision for revitalization realistically addresses the needs of the nominated area in a way that takes advantage of its assets; and

(4) *Benchmarks and learning.* The extent to which the plan includes performance benchmarks for measuring progress in its implementation, including an on-going process for adjustments, corrections and building on what works.

§ 25.202 Submission of nominations for designation.

(a) *General.* A separate nomination for designation as an Empowerment Zone and/or Enterprise Community must be submitted for each rural area for which such designation is requested. The nomination shall be submitted in a form to be prescribed by USDA in the Notice Inviting Applications published in the **Fedeal Register**, and must contain complete and accurate information.

(b) *Certifications.* Certifications must be submitted by the State(s) and local government(s) requesting designation stating that:

(1) The nominated area satisfies the boundary tests of § 25.100(d) of this part;

(2) The nominated area is one of pervasive poverty, unemployment, and general distress, as described by § 25.102 of this part;

(3) The nominated area satisfies the poverty rate criteria set forth in § 25.103 of this part;

(4) The nominated rural area contains no portion of an area that is either already designated as an Empowerment Zone and/or Enterprise Community or is otherwise included in any other area nominated for designation as a Empowerment Zone and/or Enterprise Community;

(5) Each nominating governmental entity has the authority to:

(i) Nominate the rural area for designation as an Empowerment Zone and/or Enterprise Community;

(ii) Make the State and local commitments required by § 25.200(d) of this part; and

(iii) Provide written assurances satisfactory to the Secretary that these commitments will be met;

(6) Provide assurances the amounts provided to the State for the area under section 2007 of Title XX of the Social Security Act will not be used to supplant Federal or non-Federal funds for sevices and activities which promote the purposes of section 2007;

(7) Provide that the nominating governments or corporations agree to make available all information requested by USDA to aid in the evaluation of progress in implementing the strategic plan and reporting on the use of EZ/EC SSBG funds; and

(8) Provide assurances that the nominating State(s) agrees to distribute the EZ/EC SSBG funds in accordance with the strategic plan submitted for the designated zone or community.

(c) *Maps and area description.* Maps and a general description of the nominated area shall accompany the nomination request.

Subpart D—Designation Process

§ 25.300 USDA action and review of nominations for designation.

(a) *Establishment of submission procedures.* USDA will establish a time period and procedure for the submission of application as Empowerment Zones or Enterprise Communities, including submission deadlines and addresses, in a Notice Inviting Applications, to be published in the **Federal Register**.

(b) *Acceptance for processing.* USDA will accept for processing those applications as Empowerment Zones or Enterprise Communities which USDA determines have met the criteria required under this part. USDA will notify the State(s) and local government(s) whether or not the nomination has been accepted for processing. The criteria for acceptance for processing is that the application as an Empowerment Zone or Enterprise Community must be received by USDA on or before the close of business on the date established by the Notice Inviting Applications published in the **Federal Register**. The applications must be complete and must be accompanied by a strategic plan, as required by § 25.200(c) of this part and the certifications required by § 25.202(b) of this part.

(c) *Evaluation of applications.* In the process of reviewing each application accepted for processing, USDA may undertake a site visit(s) to any nominated area to aid in the process of evaluation.

(d) *Modification of the strategic plan, boundaries of nominated rural areas, and/or period during which designation is in effect.* Subject to the limitations imposed by § 25.100 of this part, USDA may request additional information pertaining to the plan and proposed area and may, as a part of that request, suggest modifications to the plan that would enhance its effectiveness.

(e) *Publication of designations.* Final determination of the boundaries of areas and the term for which the designations will remain in effect will be made by the Secretary. Announcements of those nominated areas designated as Empowerment Zones of Enterprise Communities will be made by publication of a Notice in the **Federal Register**.

§ 25.301 Selection factors for designation of nominated rural areas.

In choosing among nominated rural areas eligible for designation, the Secretary shall consider:

(a) The effectiveness of the Strategic plan, in accordance with the key principles set out in § 25.201 of this part.

(b) The effectiveness of the assurances made pursuant to § 25.200(a)(2) of this part that the strategic plan will be implemented.

(c) The extent to which an application proposes activities that are creative and innovative.

(d) Such other factors as established by the Secretary, which include the degree of need demonstrated by the nominated area for assistance under this part and the diversity within and among the nominated areas. If other factors are established by USDA, a **Federal Register** Notice will be published identifying such factors, along with an extension of the application due date if necessary.

§ 25.302 Number of Rural Empowerment Zones and Enterprise Communities.

The Secretary may designate up to three rural Empowerment Zones and up to thirty rural Enterprise Communities.

Subpart E—Post-Designation Requirements

§ 25.400 Reporting.

USDA will require periodic reports for the Empowerment Zones and Enterprise Communities and other applicants designated pursuant to this part. These reports will identify the community, local government and State actions which have been taken in accordance with the strategic plan. In addition to these reports, such other information relating to designated Empowerment Zones and Enterprise Communities as USDA shall request from time to time shall be submitted promptly. On the basis of this information and of on-site reviews, USDA will prepare and issue periodic reports on the effectiveness of the Empowerment Zones/Enterprise Communities Program.

§ 25.401 Periodic performance reviews.

USDA will regularly evaluate the progress in implementing the strategic plan in each designated Empowerment Zone and Enterprise Community on the basis of performance reviews to be conducted on site and using other information submitted. USDA may also commission evaluations of the Empowerment Zone program as a whole by an impartial third party. Where not prevented by State law, nominating State governments must provide the timely release of data requested by USDA for the purposes of monitoring and assisting the success of Empowerment Zones and Enterprise Communities. The implementing entity for Empowerment Zones/Enterprises Communities will be responsible for EZ/EC program activities and fiscal management of the EZ/EC funds. They must demonstrate continual involvement of all segments of the community, including low income/disadvantaged residents, in the implementation of the Strategic Plan.

§ 25.402 Validation of designation.

(a) *Reevaluation of designations.* On the basis of the performance review described in § 25.401 of this part, and subject to the provisions relating to the revocation of designation appearing at § 25.403 of this part, USDA will make findings as to the continuing eligibility for the validity of the designation of any Empowerment Zone or Enterprise Community. Determinations of whether any designated Empowerment Zone or Enterprise Community remains in good standing shall be promptly communicated to all Federal agencies providing assistance or administering programs under which assistance can be made available in such Zone or community.

(b) *Modification of designation.* Based on a rural Zone or community's success in carrying out its strategic plan, and subject to the provisions relating to revocation of designation appearing at § 25.403 of this part and the requirements as to the number, maximum population and other characteristics of rural Empowerment Zones set forth in § 25.100 of this part, the Secretary may modify designations by reclassifying rural Empowerment Zones as Enterprise Communities or Enterprise Communities as Empowerment Zones.

§ 25.403 Revocation of designation.

(a) *Basis for revocation.* The Secretary may revoke the designation of a rural area as an Empowerment Zone or Enterprise Community if the Secretary determines on the basis of the periodic monitoring and assessments described in § 25.401 of this part, that the applicant or the State(s) or local government(s) in which the rural area is located:

(1) Has modified the boundaries of the area;

(2) Has failed to make satisfactory progress in achieving the benchmarks set forth in the strategic plan; or

(3) Has not complied substantially with the strategic plan.

(b) *Warning letter.* Before revoking the designation of a rural area as an Empowerment Zone or Enterprise Community, the Secretary will issue a letter of warning to the applicant and the nominating State(s) and local government(s):

(1) Advising that the Secretary has determined that the applicant and/or the nominating local government(s)and/or State(s) has:

(i) Modified the boundaries of the area; or

(ii) Is not complying substantially with, or has failed to make satisfactory progress in achieving the benchmarks set forth in the strategic plan prepared pursuant to § 25.200(d) of this part; and

(2) Requesting a reply from all involved parties within 90 days of the receipt of this letter of warning.

(c) *Notice of revocation.* After allowing 90 days from the date of receipt of the letter of warning for response, and after making a determination pursuant to paragraph (a) of this section, the Secretary may issue a final notice of revocation of the designation of the rural area as an Empowerment Zone or Enterprise Community.

(d) *Notice to affected Federal agencies.* USDA will notify all affected Federal agencies providing assistance in a rural Empowerment Zone or Enterprise Community of its determination to revoke any designation pursuant to this section or to modify a designation pursuant to § 25.402 of this part.

Subpart F—Special Rules

§ 25.500 Indian reservations.

No rural Empowerment Zone or Enterprise Community may include any area within an Indian reservation.

§ 25.501 Governments.

If more than one State or local government seeks to nominate an area under this part, any reference to or requirement of this part shall apply to all such governments.

§ 25.502 Nominations by economic development corporations.

Any rural area nominated by an economic development corporation chartered by a State and qualified to do business in the State in which it is located, shall be treated as nominated by a State and local governments.

§ 25.503 Use of census data.

Population and poverty rate data shall be determined by the 1990 Census Data.

§ 25.504 Rural areas.

(a) *What constitutes ''rural''.* A rural area may consist of any area that lies outside the boundaries of a Metropolitan Area, as designated by the Office of Management and Budget, or, as an area that is primarily rural and has at least 50 percent of the population of the nominated area residing outside of a Metropolitan Area.

(b) *Exceptions to the definition.* On a case by case basis, the Secretary will grant requests for waiver from the definition of ''rural'' stated in paragraph (a) of this section upon a showing of good cause. Applicants seeking to apply for a rural designation who do not satisfy the definition in paragraph (a) of

this section must submit a request for waiver in writing to the Rural Business and Cooperative Development Service, Empowerment Zone Office, Department of Agriculture, AG Box 3202, 14th Street and Independence Avenue, SW, Washington, DC 20250–3200. Requests must include:

(1) The name, address and daytime phone number of the contact person for the applicant seeking the waiver; and

(2) Sufficient information regarding the area that would support the infrequent exception from the definition.

(c) *The waiver process.* The Secretary, in consultation with the Department of Commerce, will have discretion to permit rural applications for communities that do not meet the above rural criteria.

§ 25.550

Dated: January 25, 1995.

Richard E. Rominger,

Acting Secretary.

[FR Doc. 95–2313 Filed 2–3–95; 8:45 am]

BILLING CODE 3410–01–M

Animal and Plant Health Inspection Service

7 CFR Parts 300 and 319

[Docket No. 93–028–5]

Grapefruit and Mangoes From Mexico; Addition of Treatment

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are allowing the use of high-temperature forced air treatments for grapefruit and mangoes imported from Mexico. The treatments will be included in the Plant Protection and Quarantine Treatment Manual, which is incorporated by reference into the Code of Federal Regulations. We are also making several nonsubstantive changes to clarify the fruits and vegetables regulations.

EFFECTIVE DATE: February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Frank Cooper, Senior Operations Officer, or Mr. Victor Harabin, Head, Permit Unit, Port Operations, Plant Protection and Quarantine, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738. The telephone number for the agency contracts will change when agency offices in Hyattsville, MD, move to Riverdale, MD, during February. Telephone: (301) 436–8645 (Hyattsville); (301) 734–8645 (Riverdale).

SUPPLEMENTARY INFORMATION:

Background

The ''Plant Protection and Quarantine Treatment Manual'' (PPQ Treatment Manual) of the Animal and Plant Health Inspection Service is incorporated by reference into the Code of Federal Regulations at 7 CFR 300.1. The PPQ Treatment Manual contains treatment schedules and information on procedures for applying treatments to allow the movement of articles under domestic and foreign plant quarantines and regulations.

Previously, the PPQ Treatment Manual provided for either cold, methyl bromide, or vapor heat as treatments for grapefruit. It also provided for hot water treatment for all mangoes and vapor heat treatment for Manila mangoes only. We now have added to the PPQ treatment manual high-temperature forced air treatments for both grapefruit and mangoes that are imported from Mexico.

These high-temperature forced air treatment were developed by the Agricultural Research Service of the U.S. Department of Agriculture as effective alternative treatments against the Mexican fruit fly in grapefruit imported from Mexico and against the Mexican, West Indian, and black fruit flies in mangoes imported from Mexico. Both treatments are administered in sealed chambers. The air may be heated in the chambers or hot air may be introduced into the chambers.

History

In a direct final rule published in the **Federal Register** on March 1, 1994 (59 FR 9613–9614, Docket No. 93–028–2), we notified the public of our intent to add to the PPQ Treatment Manual high-temperature forced air treatments for grapefruit and mangoes from Mexico. The direct final rule was to become effective 60 days after publication in the **Federal Register**, unless we received written adverse comments or written notice of intent to submit adverse comments. In response to the direct final rule, we received one written adverse comment from a representative of the citrus industry, who noted that size and weight specifications for grapefruit would exclude several larger sizes of grapefruit that are shipped to market for commercial use. Subsequently, in a document published in the **Federal Register** on April 21, 1994 (59 FR 18943, Docket No. 93–028–3), we withdrew the direct final rule and stated our intent to publish a proposed rule for public comment.

On November 14, 1994 (59 FR 56412–56413, Docket No. 93–028–4), we published a proposed rule in the **Federal Register** comparable to the direct final rule, but providing for use of the high-temperature forced air treatment on larger grapefruit. As we explained in the proposed rule, the treatment is effective against fruit flies in the larger grapefruit, but larger grapefruit will take longer to reach the required internal pulp temperature.

We also proposed to make three nonsubstantive editorial changes to simplify the fruits and vegetables regulations, contained in 7 CFR 319.56 through 319.56–8.

We solicited comments concerning our proposal for 30 days ending December 14, 1994. We received 10 comments by that date. They were from a State agricultural agency, Mexican mango and grapefruit growers, and a consumer. All of the comments supported the proposal.

Therefore, based on the rationale set forth in the proposed rule, we are adopting the provisions of the proposal as a final rule, without change.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**.

Immediate implementation of this rule is necessary to provide relief to those persons who are adversely affected by restrictions we no longer find warranted. This action provides an alternative treatment, high-temperature forced air, for grapefruit and mangoes imported from Mexico. Making this rule effective upon publication will allow interested importers and others to immediately employ high-temperature forced air treatment for grapefruit and mangoes from Mexico. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective upon publication in the **Federal Register**.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

This final rule provides an additional treatment option, high-temperature forced air, for grapefruit and mangoes imported from Mexico. Because this new treatment is optional, this rule should have no significant economic impact on entities using the cold, hot water, methyl bromide, or vapor heat treatments.

Also, since high-temperature forced air treatment provides for longer fruit shelf life than do hot water and vapor heat treatments, the most commonly used treatments, we anticipate that some private treatment enterprises will convert their facilities to employ this new optional treatment. We believe, though, that any costs of facility conversion will be offset through the production of fruit that has a longer shelf life. Therefore, we anticipate no significant change in the price or production of grapefruit and mangoes as a result of this rule.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12778

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*),

List of Subjects

7 CFR Part 300

Incorporation by reference, Plant diseases and pests, Quarantine.

7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Incorporation by reference, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, title 7, chapter III, of the Code of Federal Regulations is amended as follows:

PART 300—INCORPORATION BY REFERENCE

1. The authority citation for part 300 continues to read as follows:

Authority: 7 U.S.C. 150ee, 154, 161, 162, 167; 7 CFR 2.17, 2.51, and 371.2(c).

2. In § 300.1, paragraph (a) is revised to read as follows:

§ 300.1 Materials incorporated by reference.

(a) The Plant Protection and Quarantine Treatment Manual, which includes all revisions through February 1995, has been approved for incorporation by reference in 7 CFR chapter III by the Director of the Office of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

* * * * *

PART 319—FOREIGN QUARANTINE NOTICES

3. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151–167, and 450; 21 U.S.C. 136 and 136a; 7 CFR 2.17, 2.51, and 371.2(c).

§ 319.56–2f [Removed and Reserved]

4. Section 319.56–2f is removed and reserved.

§ 319.56–2q [Removed and Reserved]

5. Section 319.56–2q is removed and reserved.

6. In § 319.56–2x, paragraph (a), the table is amended for the Mexico entry by adding four new commodities, in alphabetical order, to read as follows:

§ 319.56–2x Administrative instructions; conditions governing the entry of certain fruits and vegetables for which treatment is required.

(a) * * *

Country/locality	Common name	Botanical name	Plant part(s)
* * * * * * *			
Mexico			
* * * * * * *			
	Grapefruit	*Citrus paradisi*	Fruit.
	Mango	*Mangerifa indica*	Fruit.
	Orange	*Citrus sinensis*	Fruit.
	Tangerine	*Citrus reticulata*	Fruit.
* * * * * * *			

Done in Washington, DC, this 30th day of January 1995.

Terry I. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 95–2746 Filed 2–3–95; 8:45 am]

BILLING CODE 3410–34–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 94–ANM–48]

Establishment of Class E Airspace; Lamar, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Lamar Municipal Airport, Lamar, Colorado. Establishment of a new instrument approach procedure requires additional controlled airspace for the procedure.

EFFECTIVE DATE: 0901 UTC, March 30, 1995.

FOR FURTHER INFORMATION CONTACT: Ted Melland, System Management Branch, ANM–530, Federal Aviation Administration, Docket No. 94–ANM–48, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone number: (206) 227–2536.

SUPPLEMENTARY INFORMATION:

History

On December 5, 1994, the FAA proposed to amend part 71 of Federal Aviation Regulations (14 CFR part 71) to

establish Class E airspace area at Lamar, Colorado (59 FR 62360). Interested parties were invited to participate in the rulemaking proceeding by submitting written comments on the proposal. No comments were received.

The coordinates for this airspace docket are based on North American Datum 83. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in Paragraph 6005 of FAA Order 7400.9B dated July 18, 1994, and effective September 16, 1994, which is incorporated by reference in 14 CFR 71.1. This action is necessary to accommodate a new instrument approach procedure at Lamar Municipal Airport. The area will be depicted on aeronautical charts for pilot reference. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of Federal Aviation Regulations amends Class E airspace at Lamar, Colorado. The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the FAA amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9B, Airspace Designations and Reporting Points, dated July 18, 1994, and effective September 16, 1994, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth

* * * * *

ANM CO E5 Lamar, CO [Revised]

Lamar Municipal Airport, CO
(Lat. 38°04′12″ N, long, 102°41′19″ W)
Lamar VORTAC
(Lat. 38°11′50″ N, long. 102°41′15″ W)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the Lamar Municipal Airport, and within 3.1 miles each side of the Lamar VORTAC 001° radial extending from the 6.8-mile radius to 8.7 miles north of the VORTAC; that airspace extending upward from 1,200 feet above the surface beginning on the Colorado/Kansas state boundary at lat. 38°34′00″ N; thence along the Colorado/Kansas state boundary to lat. 37°11′00″ N; to lat. 37°11′00″ N, long. 103°24′00″ W; to lat. 38°34′00″ N, long. 103°24′00″ W; thence to point of beginning.

* * * * *

Issued in Seattle, Washington, on January 24, 1995.

Bill H. Ellis,

Acting Assistant Manager, Air Traffic Division, Northwest Mountain Region.

[FR Doc. 95–2809 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 94–AWP–24]

Amendment to Class E Airspace; Camarillo, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment modifies the Class E airspace area at Camarillo, CA, to accommodate aircraft executing the VHF Omnidirectional Range (VOR) or Global Positioning System (GPS) standard instrument approach procedure (SIAP). This action will provide adequate Class E airspace for instrument flight rules (IFR) operations at Camarillo Airport.

EFFECTIVE DATE: 0901 UTC, March 30, 1995.

FOR FURTHER INFORMATION CONTACT: Scott Speer, Airspace Specialist, System Management Branch, AWP–530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California, 90261, telephone (310) 297–0010.

SUPPLEMENTARY INFORMATION:

History

On November 30, 1994, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by modifying the Class E airspace at Camarillo, CA (59 FR 63937). This action will provide additional controlled airspace to accommodate a VOR and GPS instrument approach procedure to Runway 26 at the Camarillo Airport.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace areas designated as an extension to a Class D surface area are published in paragraph 6004 of FAA Order 7400.9B, dated July 18, 1994, and effective September 16, 1994, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) amends the Class E airspace area at Camarillo, CA, by providing additional controlled airspace for aircraft executing the VOR or GPS instrument approach procedure to Runway 26 at the Camarillo Airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 10034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9B, Airspace Designations and Reporting Points, dated July 18, 1994, and effective September 16, 1994, is amended as follows:

Paragraph 6004 Class E airspace areas designated as an extension to a Class D surface area.

* * * * *

AWP CA E4 Camarillo, CA [Revised]

Camarillo Airport, CA
(Lat. 34°12′50″ N, long. 119°05′39″ W)
Camarillo VOR/DME
(Lat. 34°12′45″ N, long. 119°05′39″ W)

That airspace extending upward from the surface within 3.7 miles each side of the Camarillo 082° radial extending from the 4.3-miles radius of the Camarillo Airport to 9.8 miles east of the Camarillo VOR. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Los Angeles, California, on January 20, 1995.

Richard R. Lien,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 95–2811 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 94–AWP–21]

Establishment of Class E Airspace; Colorado City, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Colorado City, AZ. Controlled airspace is established to accommodate aircraft executing the Nondirectional Radio Beacon (NDB) Standard Instrument Approach Procedure (SIAP) at Colorado City Municipal Airport. This action will establish adequate Class E airspace for instrument flight rules (IFR) operations at Colorado City Municipal Airport.

EFFECTIVE DATE: 0901 UTC, May 25, 1995.

FOR FURTHER INFORMATION CONTACT:
Scott Speer, Airspace Specialist, System Management Branch, AWP–530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 297–0010.

SUPPLEMENTARY INFORMATION:

History

On November 30, 1994, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by establishing Class E airspace at Colorado City, AZ (59 FR 65284). The proposed action would provide controlled airspace to accommodate an NDB SIAP at the Colorado Airport.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Class E airspace areas extending from 700 feet or above the surface of the earth are published in paragraphs 6005 of FAA Order 7400.9B, dated July 18, 1994, and effective September 16, 1994, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) establishes Class E airspace at Colorado City, AZ. This action will provide adequate Class E airspace for IFR operators executing the NDB approach at the Colorado City Municipal Airport. The coordinates for this airspace docket are based on North American Datum 83.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9B, Airspace Designations and Reporting Points, dated July 18, 1994, and effective September 16, 1994, is amended as follows:

Paragraph 6005 Class E airspace area extending from 700 feet or more above the surface of the earth.

* * * * *

AWP CA E5 Colorado City, AZ [New]

Colorado City Municipal Airport, AZ
(Lat. 36°57′08″ N, long. 113°00′59″ W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Colorado City Municipal Airport, and within 4 miles either side of the 173° bearing from the Colorado City Municipal Airport extending from the 6.5-mile radius to 12 mile south of the Colorado City Municipal Airport; that airspace extending upward from 1200 feet above the surface bounded by a line beginning at lat. 36°58′00″ N, long. 112°52′00″ W, thence south to lat. 36°40′00″ N, long. 112°52′00″ W, thence west to lat. 36°40′00″ N, long. 113°11′00″ W, thence north to lat. 36°57′00″ N, long. 113°12′00″ W, thence north to lat. 37°13′00″ N, long. 113°12′00″ W, thence northeast to lat. 37°15′00″ N, long. 113°06′00″ W, thence southwest to the point of beginning.

* * * * *

Issued in Los Angeles, California, on January 25, 1995.

Dennis T. Koehler,

Acting Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 95–2812 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 97

[Docket No. 28064; Amdt. No. 1649]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference-approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS–420), Technical Programs Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8277.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Navigation (air).

Issued in Washington, DC on January 27, 1995.

Thomas C. Accardi,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. app. 1348, 1354(a), 1421 and 1510; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.33, 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TCAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

* * * *Effective March 30, 1995*

Ketchikan, AK, Ketchikan Intl, ILS/DME–1, RWY 11, Amdt 6
Sacramento, CA, Sacramento Metropolitan, ILS RWY 16R, Amdt 13
West Palm Beach, FL, Palm Beach Intl, VOR OR GPS RWY 9L, Amdt 1
West Palm Beach, FL, Palm Beach Intl, VOR OR GPS RWY 13, Amdt 2
West Palm Beach, FL, Palm Beach Intl, VOR OR GPS RWY 27R, Amdt 1
West Palm Beach, FL, Palm Beach Intl, VOR OR GPS RWY 31, Amdt 3
West Palm Beach, FL, Palm Beach Intl, LOC BC RWY 27R, Amdt 12
West Palm Beach, FL, Palm Beach Intl, NDB RWY 9L, Amdt 19
West Palm Beach, FL, Palm Beach Intl, ILS RWY 9L, Amdt 22
West Palm Beach, FL, Palm Beach Intl, RADAR–1, Amdt 9
Corning, IA, Corning Muni, NDB or GPS RWY 17, Amdt 1
Jefferson, IA, Jefferson Muni, NDB OR GPS RWY 32, Amdt 4
Osceola, IA, Osceola Muni, VOR/DME OR GPS RWY 18, Amdt 1
Winterset, IA, Winterset-Madison County, VOR/DME OR GPS–A, Amdt 1
Newton, KS, Newton-City-County, VOR/DME RNAV RWY 17, Amdt 1
Newton, KS, Newton-City-County, VOR/DME RNAV RWY 35, Amdt 1
Westhampton Beach, NY, Francis S. Gabreski, Copter ILS 236, Orig
Perry, OK, Perry Muni, VOR/DME OR GPS RWY 17, Amdt 2
Galax-Hillsville, VA, Twin County, NDB or GPS–A, Amdt 5

* * * *Effective March 2, 1995*

Jeffersonville, IN, Clark County, VOR OR GPS RWY 18, Amdt 3
Jeffersonville, IN, Clark County, NDB RWY 18, Amdt 1
Jeffersonville, IN, Clark County, ILS RWY 18, Amdt 1
Chillicothe, OH, Ross County, VOR RWY 23, Amdt 3
Chillicothe, OH, Ross County, NDB RWY 23, Amdt 7

* * * *Effective January 19, 1995*

Pensacola, FL, Pensacola Regional, NDB OR GPS RWY 35, Amdt 16

[FR Doc. 95–2814 Filed 2–3–95; 8:45 am]
BILLING CODE 4910–13–M

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14 CFR Part 97

[Docket No. 28062; Amdt. No. 1647]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference-approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which the affected airport is located; or
3. The Flight Inspection Area Office which originated the SIAP.

For Purchase

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS–420), Technical Programs Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8277.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Form 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the needs for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. The SIAPs contained in this amendment are based on the criteria contained in the United States Standard for Terminal Instrument Approach Procedures (TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports.

The FAA has determined through testing that current non-localizer type, non-precision instrument approaches developed using the TERPS criteria can be flown by aircraft equipped with Global Positioning System (GPS) equipment. In consideration of the above, the applicable Standard Instrument Approach Procedures (SIAPs) will be altered to include ''or GPS'' in the title without otherwise reviewing or modifying the procedure. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally

current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Navigation (air).

Issued in Washington, DC on January 27, 1995.

Thomas C. Accardi,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instruction Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. app. 1348, 1354(a), 1421 and 1510; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.27 NDB, NDB/DME; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

** * * Effective March 30, 1995*

St. Mary's, AK, St Mary's, NDB/DME or GPS RWY 16, Amdt 1A
St. Mary's, AK, St Mary's, NDB or GPS RWY 34, Orig-A
St. Paul Island, AK, St. Paul Island, NDB/DME or GPS RWY 18, Amdt 1A
St. Paul Island, AK, St. Paul Island, NDB–3 or GPS RWY 36, Amdt 1
Tanana, AK, Ralph M. Calhoun Memorial, VOR/DME or GPS RWY 6, Orig
Tanana, AK, Ralph M. Calhoun Memorial, VOR or GPS–A, Amdt 6
Tanana, AK, Ralph M. Calhoun Memorial, NDB or GPS–B, Amdt 3
Togiak Village, AK, Togiak, NDB/DME or GPS–A, Orig-A
Togiak Village, AK, Togiak, NDB or GPS–B, Orig-A
Alexander City, AL, Thomas C. Russell Field, NDB or GPS–A, Amdt 1
Greensboro, AL, Greensboro Muni, NDB or GPS RWY 36, Orig
Greenville, AL, Greenville Muni, NDB or GPS RWY 32, Amdt 4
Gulf Shores, AL, Jack Edwards, VOR or GPS–A, Amdt 1
Ozark, AL, Blackwell Field, VOR or GPS RWY 30, Amdt 6A
Pell City, AL, Saint Clair County, VOR or GPS–A, Amdt 7
Prattville, AL, Autauga County, VOR/DME or GPS–A, Amdt 1
Tuskegee, AL, Moton Field Municipal, VOR or GPS–A, Amdt 3
Vernon, AL, Lamar County, VOR/DME or GPS–A, Amdt 2
Wetumpka, AL, Wetumpka Muni, VOR or GPS–A, Amdt 1
Dothan, AL, Dothan, VOR–A or TACAN, Amdt 11A
Mountain View, AR, Mountain View Wilcox Memorial Field, NDB or GPS–A, Amdt 1
St. Johns, AZ, St Johns Industrial Air Park, VOR/DME or GPS–A, Amdt 1
Sedona, AZ, Sedona, NDB or GPS–A, Amdt 3
Window Rock, AZ, Window Rock, RNAV or GPS RWY 2, Amdt 1
Window Rock, AZ, Window Rock, VOR/DME or GPS–A, Orig
San Diego, CA, Brown Field Muni, VOR or GPS–A, Amdt 3
San Diego, CA, Montgomery Field, NDB or GPS RWY 28R, Amdt 1
San Diego, CA, San Diego Intl-Lindbergh Field, NDB or GPS RWY 9, Amdt 19B
San Diego, CA, San Diego Intl-Lindbergh Field, NDB or GPS RWY 27, Amdt 1
Santa Ana, CA, John Wayne Arpt-Orange County, NDB or GPS RWY 1L, Amdt 1
Watsonville, CA, Watsonville Muni, VOR/DME or GPS–A, Orig-A
Watsonville, CA, Watsonville Muni, NDB or GPS–B, Amdt 1A
Woodland, CA, Watts-Woodland, VOR or GPS–A, Amdt 4
Miami, FL, Dade-Collier Training And Transition, NDB or GPS RWY 9, Amdt 12
Orlando, FL, Executive, NDB or GPS RWY 7, Amdt 15
Plant City, FL, Plant City Muni, NDB or GPS RWY 9, Orig
Fort Leavenworth, KS, Sherman AAF, VOR or GPS–A, Amdt 3A
Fort Leavenworth, KS, Sherman AAF, NDB or GPS RWY 33, Amdt 3A
Goodland, KS, Renner Fld/Goodland Muni NDB or GPS RWY 30, Amdt 6A
Grand Isle, LA, Grand Isle Seaplane Base, VOR/DME or GPS–C, Amdt 7
Grand Isle, LA, Grand Isle Seaplane Base, VOR or GPS–A, Amdt 8
Grand Isle, LA, Grand Isle Seaplane Base, NDB or GPS–B, Amdt 9
Marshall, MN, Marshall Muni-Ryan Field, VOR/DME or GPS RWY 30, Amdt 1B
Springfield, MN, Springfield Muni, VOR/DME or GPS RWY 14, Amdt 2B
Osage Beach, MO, Grand Glaize-Osage Beach, VOR or GPS RWY 32, Amdt 4
Sedalia, MO, Sedalia Memorial, NDB or GPS RWY 18, Amdt 7B
Sullivan, MO, Sullivan Regional, NDB or GPS RWY 24, Orig
Lakewood, NJ, Lakewood, VOR or GPS RWY 6, Amdt 4
Washington Court House, OH, Fayette County, NDB or GPS RWY 22, Amdt 3
Prague, OK, Prague Muni, NDB or GPS RWY 17, Amdt 1
Tahlequah, OK, Tahlequah Muni, NDB or GPS RWY 17, Orig
Providence, RI, Theodore Francis Green State, VOR/DME or GPS RWY 23, Amdt 6
Bristol-Johnson-Kingsport, TN, Tri-City Regional, NDB or GPS RWY 5, Amdt 16
Bristol-Johnson-Kingsport, TN, Tri-City Regional, NDB or GPS RWY 23, Amdt 23
Knoxville, TN, McGhee Tyson, NDB or GPS RWY 5R, Amdt 4
Livingston, TN, Livingston Muni, VOR/DME or GPS RWY 21, Amdt 3
Taylor, TX, Taylor Muni, VOR/DME or GPS–A, Orig
Port Angeles, WA, Port Angeles CGAS, COPTER NDB or GPS 237, Orig-A

The following are corrected procedure titles adding ''or GPS'' published in Transmittal Letter 94–25 and 94–26.

Windfield/Arkansas City, KS, Strother Field, NDB or GPS RWY 35, Amdt 3A
Monett, MO, Monett Muni, VOR/DME or GPS–A, Orig Procedure Cancelled
Henryetta, OK, Henryetta Muni, NDB or GPS RWY 35, Amdt 2A
Portsmouth, OH, Greater Portsmouth Regional, NDB or GPS RWY 36, Amdt 3, Procedure Cancelled.

[FR Doc. 95–2824 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 97

[Docket No. 28063; Amdt. No. 1648]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles,or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIP is specified in the amendatory provisions.

Incorporation by reference approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue SW., Washington, DC 20591;
2. The FAA Regional Office of the region in which affected airport is located; or
3. The Flight Inspection Area Office which originated the SIAP.

For Purchase

Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or
2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription

Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT: Paul J. Best, Flight Procedures Standards Branch (AFS–420), Technical Programs Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8277.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description on each SIAP is contained in the appropriate FAA Form 8260 and the National Flight Data Center (FDC)/Permanent (P) Notices to Airmen (NOTAM) which are incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviations Regulations (FAR). Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction of charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes SIAPs. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained in the content of the following FDC/P NOTAM for each SIAP. The SIAP information in some previously designated FDC/Temporary (FDC/T) NOTAMs is of such duration as to be permanent. With conversion to FDC/P NOTAMs, the respective FDC/T NOTAMs have been cancelled.

The FDC/P NOTAMs for the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Approach Procedures (TERPS). In developing these chart changes to SIAPs by FDC/P NOTAMs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in the TERPS. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are unnecessary, impracticable, and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Navigation (air).

Issued in Washington, DC, on January 27, 1995.

Thomas C. Accardi,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. app. 1348, 1354(a), 1421 and 1510; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

* * * *Effective Upon Publication*

FDC date	State	City	Airport	FDC No.	SIAP
01/24/95	ME	Mullinocket	Millinocket	5/0290	LOC RWY 29, ORIG...
01/24/95	ME	Presque Isle	Northern Main Regional Airport at Presque Isle.	5/0290	ILS, RWY 1, AMDT 4...

FDC date	State	City	Airport	FDC No.	SIAP
12/16/94	IL	Springfield	Capital	4/6984	RADAR–1 AMDT 7A...
12/23/94	NE	North Platte	North Platte Regional	4/7064	VOR OR GPS RWY 35, AMDT 17...

[FR Doc. 95–2815 Filed 2–3–95; 8:45 am]
BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–7132; International Series Release No. 780; File No. S7–36–94]

RIN 3235–AG26

Adoption of Amendments To Clarify Safe Harbors for Broker-Dealer Research Reports

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is announcing the adoption of amendments relating to the safe harbor provisions of Rules 138 and 139 under the Securities Act of 1933. The amendments clarify the availability of the safe harbor provisions of Rule 138 relating to broker-dealer research reports on individual domestic and foreign companies and the availability of the safe harbor provisions of Rule 139 for broker-dealer industry research reports which include sizable, first-time foreign registrants.

EFFECTIVE DATE: February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Annemarie Tierney, (202) 942–2990, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: As described in detail below, the Commission is adopting amendments to Rule 138[1] and Rule 139[2] under the Securities Act of 1933 (the ''Securities Act'')[3]. The amendments adopted today were proposed by the Commission on December 13, 1994.[4]

[1] 17 CFR 230.138.

[2] 17 CFR 230.139.

[3] 15 U.S.C. 77a *et seq.*

[4] *See* Release No. 33–7120 (Dec. 13, 1994), 59 FR 31038. One comment letter, which expressed support for the proposal, was received. That letter is available for public inspection and copying in File Number S7–36–94 at the Commission's Public Reference Room in Washington, D.C.

I. Availability of Research Report Safe Harbors

Rule 138 under the Securities Act permits publication of information, opinions and recommendations concerning qualifying issuers by broker-dealers that are participants in a distribution, so long as the reports contain information, opinions or recommendations regarding a specified class of the issuer's securities which is not the subject of the offering in which the broker-dealer is a participant. The amendments adopted today clarify that Rule 138 is available for offerings registered on Form S–3. The amendments also clarify that Form F–3 eligible issuers qualify for the rule, as do sizable first-time foreign issuers that meet the alternative offshore trading history test adopted for Rule 139.

In addition, in light of the fact that shelf registration statements often register both debt and equity securities (on an either allocated or unallocated basis), the Commission is amending Rule 138 to add an instruction codifying the staff interpretation that the rule should be applied on an offering-by-offering basis for issuers which are eligible to use Forms S–3 or F–3 and are using the Commission's shelf registration procedures. Thus, the filing of a shelf registration statement covering different classes of securities does not impede the availability of the rule.

Rule 139 under the Securities Act provides safe harbor protection from the registration requirements of that Act for the distribution by broker-dealers of information, opinions or recommendations concerning issuers in the process of registering securities under the Securities Act. The amendments adopted today make clear that the expanded eligibility requirements adopted last year[5] for sizable foreign issuers that satisfy the alternative offshore trading history test in Rule 139 are also available for those issuers' initial public offerings in the United States.

II. Cost-Benefit Analysis

No information was provided in response to the Commission's request regarding the costs and benefits of the amendments being adopted today. The Commission believes that the adoption of these amendments will benefit both issuers and broker-dealers without imposing any additional costs.

[5] Release No. 33–7053 (Apr. 19, 1994), 59 FR 21644.

III. Statutory Bases

The Commission's rules are being amended pursuant to sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933, as amended.

IV. Effective Date

The final amendments to the Commission's rules shall be effective immediately upon publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publication for, *inter alia*, ''a substantive rule which grants or recognizes an exemption or relieves a restriction.'' 5 U.S.C. § 553(d)(1).

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. By revising § 230.138 to read as follows:

§ 230.138 Definition of ''offer for sale'' and ''offer to sell'' in sections 2(10) and 5(c) in relation to certain publications.

(a) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to a nonconvertible debt security or to a nonconvertible, nonparticipating preferred stock, publication or distribution in the regular course of its

business by a broker or dealer of information, opinions or recommendations relating solely to common stock or to debt or preferred stock convertible into common stock of such registrant shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*) even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(b) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to common stock or to debt or preferred stock convertible into common stock, the publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to a nonconvertible debt security, or to a nonconvertible nonparticipating preferred stock shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(c)(1) The registrant meets all of the conditions for the use of Form S–2 [§ 239.12 of this chapter] or Form F–2 [§ 239.32 of this chapter];

(2) The registrant meets the registrant requirements of Form S–3 [§ 239.13 of this chapter] or Form F–3 [§ 239.33 of this chapter]; or

(3) The registrant is a foreign private issuer which meets all the registrant requirements of Form F–3 [§ 239.33 of this chapter], other than the reporting history provisions of paragraph A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I. of such form and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a).

Instruction to Rule 138

When a registration statement relates to securities which are being registered for an offering to be made on a continuous or delayed basis pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)) and the securities which are being registered include classes of securities which are specified in both paragraphs (a) and (b) of this section on either an allocated or unallocated basis, a broker or dealer may nonetheless rely on:

1. Paragraph (a) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (a) of this section, and

2. Paragraph (b) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (b) of this section.

3. By revising the introductory text to § 230.139 and paragraph (a)(2) to read as follows:

§ 230.139 Definition of ''offer for sale'' and ''offer to sell'' in sections 2(10) and 5(c) in relation to certain publications.

Where a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or which is a foreign private issuer meeting the conditions of paragraph (a)(2) of this section proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) relating to its securities, the publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to the registrant or any class of its securities shall not be deemed to constitute an offer for sale or offer to sell the securities registered or proposed to be registered for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of such securities, if the conditions of paragraph (a) or (b) of this section have been met:

(a) * * *

(2) The registrant is a foreign private issuer that meets all the registrant requirements of Form F–3 (§ 239.33 of this chapter), other than the reporting history provisions of paragraphs A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I of such form, and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a), and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business.

* * * * *

By the Commission.

Dated: February 1, 1995.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2892 Filed 2–2–95; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 4

[T. D. 95–14]

Addition of Brazil to the List of Nations Entitled to Special Tonnage Tax Exemption

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Pursuant to information provided by the Department of State, the United States Customs Service has found that Brazil no longer imposes discriminating duties of tonnage or imposts upon vessels belonging to citizens of the United States. Accordingly, vessels of Brazil are exempt from special tonnage taxes and light money in ports of the United States. This document amends the Customs Regulations by adding Brazil to the list of nations whose vessels are exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in Brazil became effective on September 15, 1994. This amendment is effective February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Barbara E. Whiting, Carrier Rulings Branch (202–482–6940).

SUPPLEMENTARY INFORMATION:

Background

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, called ''light money,'' on all foreign vessels which enter United States ports (46 U.S.C. App. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. App. 141).

Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been found to be exempt from the payment of any higher tonnage

duties than are applicable to vessels of the United States and from the payment of light money. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

Brazil was previously included in the list of exempted nations in § 4.22, Customs Regulations (19 CFR 4.22), but the U.S. Department of State informed Customs that U. S. vessels and their cargoes were being charged discriminatory duties in the form of lighthouse fees and a Merchant Marine Renewal Tax by the Government of Brazil. Accordingly, Brazil was removed from the list of exempted nations by means of a final rule published in the **Federal Register** on March 5, 1993 (58 FR 12538).

The Department of State now informs Customs that the Government of Brazil has agreed to exempt vessels of the United States from payment of lighthouse fees, effective September 15, 1994. The Government of Brazil also indicated that it has ended rebates of the Merchant Marine Renewal Tax to Brazilian-registered ships, so that duty is no longer being applied in a discriminatory manner.

Finding

On the basis of the above-mentioned information from the Department of State regarding the current absence of discriminatory duties of tonnage or impost imposed upon U.S. vessels in the ports of Brazil, the Customs Service has determined that vessels of Brazil are exempt from the payment of the special tonnage tax and light money, effective September 15, 1994. The Customs Regulations are amended accordingly.

Inapplicability of Public Notice and Delayed Date Requirements, the Regulatory Flexibility Act and Executive Order 12866

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary; further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This amendment does meet the criteria for a ''significant regulatory action'' as specified in Executive Order 12866.

Drafting Information

The principal author of this document was Janet L. Johnson, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 4

Cargo vessels, Customs duties and inspection, Maritime carriers, Vessels.

Amendment to the Regulations

Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * *

Section 4.22 also issued under 46 U.S.C. App. 121, 128, 141;

* * * * *

§ 4.22 [Amended]

2. Section 4.22 is amended by inserting ''Brazil'' in appropriate alphabetical order.

Dated: January 31, 1995.

Harold M. Singer,

Chief, Regulations Branch.

[FR Doc. 95–2842 Filed 2–3–95; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 91

[Docket No. R–95–1731; FR–3611–N–07]

Comprehensive Housing Affordability Strategy

AGENCY: Office of the Secretary, HUD.

ACTION: Partial waiver of rule.

SUMMARY: This notice informs the public that the Secretary is waiving three provisions of the Comprehensive Housing Affordability Strategy (CHAS) rule that is in effect until it is replaced by the Consolidated Plan rule on February 6, 1995. These three provisions are being waived to permit an orderly transition from the CHAS to the Consolidated plan.

EFFECTIVE DATE: December 31, 1994.

FOR FURTHER INFORMATION CONTACT: Joseph F. Smith, Director, Office of Executive Services, Office of Community Planning and Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–1283 (voice) or (202) 708–2565 (TDD). These are not toll-free numbers. Copies of this notice will be made available on tape or large print for those with impaired vision that request them. They may be obtained at the above address.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Housing and Urban Development intends to reduce the burden of administering the housing and community development programs by consolidating the planning and application requirements into a single housing and community development strategy. The new consolidated plan integrates the following submissions into one consolidated document: The Comprehensive Housing Affordability Strategy, the Community Development Plan, the Community Development Block Grant Final Statement, the HOME Program Description, the Emergency Shelter Grant application, and the Housing Opportunities for Persons With AIDS application.

The consolidated plan requirements were published in a proposed rule on August 5, 1994 (59 FR 40129). The final consolidated plan submission rule, to be codified at 24 CFR part 91, was published on January 5, 1995 (60 FR 1878), replacing the CHAS regulations. The Department did not want jurisdictions that are preparing a consolidated plan under the new rule to be burdened unnecessarily by preparing a CHAS annual plan and a CHAS annual performance report.

Some of the requirements of the CHAS rule contain provisions that create obstacles for jurisdictions in making the transition to the consolidated plan. Section 91.70 of the CHAS rule would require States and local governments to submit a CHAS annual plan for the period of October 1, 1994 through September 30, 1995 (Fiscal Year 1995) by December 31, 1994. Section 91.80(a)(2) would require them to submit certifications of consistency with the annual plan for the current fiscal year (now Fiscal Year 1995). Section 91.82(b) would require them to submit CHAS annual performance reports for the 12-month period ending September 30, 1994 by December 31, 1994. These provisions are the subject of this waiver document.

II. Waiver

Pursuant to the authority of 24 CFR 91.99, the Department hereby waives the following provisions of the CHAS regulations, 24 CFR part 91, which are in effect until February 6, 1995:

(1) Section 91.70(a), to the extent that it would require States and local governments to submit a CHAS annual plan for Fiscal Year 1995 (the period from October 1, 1994 through September 1995);

(2) Section 91.80(a)(2), to the extent that it would require a certification of consistency to apply to a new annual plan for Federal Fiscal Year 1995, rather than the annual plan submitted for Fiscal Year 1994 extended to cover the period in Fiscal Year 1995 until the beginning of the first program year under the consolidated plan;

(3) Section 91.82(b), to the extent that it would require an annual performance report to be submitted by December 31, 1994, to extend the submission deadline to 90 days following the first day of the jurisdiction's first program year under the consolidated plan regulation, in accordance with the revised 24 CFR part 91 published on January 5, 1995.

The good cause for waiver of these provisions is to avoid unnecessary duplication of effort that would otherwise be required for States and local governments developing a consolidated plan and the undue hardship that would result if jurisdictions were not able to provide required certificates of consistency for this time period from October 1, 1994 to the beginning of the Consolidated Plan program year.

III. Effect

As a result of the first waiver, jurisdictions need not submit a CHAS annual plan for the time period between the end of Fiscal Year 1994 and the beginning of the jurisdiction's consolidated program year. The jurisdiction's previously approved CHAS will remain in effect until the start date of the jurisdiction's new consolidated program year, at which point the jurisdiction's new consolidated plan will take effect. The second waiver allows jurisdictions to use their annual plan for Fiscal Year 1994 as extended by this notice for the purpose of certifications of consistency. The third waiver allows jurisdictions to submit a last performance report under the CHAS for a period longer than 12 months, to include Fiscal Year 1994 and the period between the end of Fiscal Year 1994 and the beginning of the first Consolidated Plan program year.

To the extent that a jurisdiction determines that its CHAS needs to be updated, an amendment to the Fiscal Year 1994 CHAS may be submitted to reflect any change. (Under the Consolidated Plan rule, the new consolidated plan strategy is due at least 45 days before the start of the consolidated plan year selected by each jurisdiction.)

Dated: January 31, 1995.

Henry G. Cisneros,

Secretary.

[FR Doc. 95–2896 Filed 2–2–95; 11:43 am]

BILLING CODE 4210–32–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AC25

Endangered and Threatened Wildlife and Plants; Spruce-Fir Moss Spider Determined To Be Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines the spruce-fir moss spider (*Microhexura montivaga*) to be an endangered species under the Endangered Species Act of 1973, as amended (Act). This spider is currently known from four mostly small populations located in western North Carolina and eastern Tennessee. The spider's damp, high-elevation forest habitat is deteriorating rapidly due primarily to exotic insects and possibly past land use history, air pollution, and other factors not yet fully understood. The species' current low numbers also increase its vulnerability to harm from other threats. This final rule extends Federal protection under the Act to the spruce-fir moss spider.

EFFECTIVE DATE: March 8, 1995.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service Field Office, 330 Ridgefield Court, Asheville, North Carolina.

FOR FURTHER INFORMATION CONTACT: Mr. John Fridell at the above address (704/665–1195, Ext. 225).

SUPPLEMENTARY INFORMATION:

Background

The spruce-fir moss spider was originally described by Crosby and Bishop (1925) based on collections made from a mountain peak in western North Carolina in 1923 (Coyle 1981). Only a few specimens were taken, and little was known about the species until its rediscovery approximately 50 years later by Dr. Frederick Coyle (Western Carolina University, Cullowhee, North Carolina) and Dr. William Shear (Hampden-Sydney College, Hampden-Sydney, Virginia) (Coyle 1981). *Microhexura montivaga* is one of only two species belonging to the genus *Microhexura* in the family *Dipluridae* (Coyle 1981; Harp 1991, 1992). The other species in the genus, *M. idahoana,* occurs only in the Pacific Northwest (Coyle 1981). Diplurids belong in the primitive suborder *Mygalomorphae,* which are often popularly referred to as ''tarantulas'' (Harp 1991, 1992). The genus *Microhexura* is the northernmost representative of the family *Dipluridae* and is also one of the smallest of the mygalomorph spiders, with adults measuring only 2.5 to 3.8 millimeters (0.10 to 0.15 inch) (Coyle 1981). Coloration of *M. montivaga* ranges from light brown to a darker reddish brown, and there are no markings on the abdomen (Harp 1992). The carapace is generally yellowish brown (Harp 1992). The most reliable field identification characteristics for the spruce-fir moss spider are chelicerae that project forward well beyond the anterior edge of the carapace (Harp 1992; Coyle, personal communication 1994), a pair of very long posterior spinnerets, and the presence of a second pair of book lungs, which appear as light patches posterior to the genital furrow (Harp 1992).

The typical habitat of the spruce-fir moss spider is found in damp but well-drained moss (and liverwort) mats growing on rocks or boulders, in well-shaded situations in the mature, high-elevation Fraser fir (*Abies fraseri*) and red spruce (*Picea rubens*) forests (Coyle 1981, Harp 1992). The forest stands at the sites where the species has been observed are composed primarily of Fraser fir with only scattered spruce being present. The moss mats found to contain the spider have all been found under fir trees (Harp, personal communication, 1994; Coyle, personal communication, 1994). The moss mats cannot be too dry (the species is very sensitive to desiccation) or too wet (large drops of water can also pose a threat to the spider) (Harp 1992). The spider constructs its tube-shaped webs in the interface between the moss mat and rock surface (Coyle 1981, Harp 1992), though occasionally the web extends into the interior of the moss mat (Harp 1992). The tubes are thin-walled and typically broad and flatten with short side branches (Coyle 1981, Harp 1992). There is no record of prey having been found in the webs of the spruce-fir moss spider nor has the species been observed taking prey in the wild, but the abundant springtails (*collembolans*) in the moss mats provide the most likely

source of food for the spider (Coyle 1981, Harp 1992).

Males of the species mature during September and October, and females are known to lay eggs in June. The egg sac is thin-walled and nearly transparent, and it may contain seven to nine eggs. The female remains with the egg sac and, if disturbed, will carry the egg sac with her fangs. Spiderlings emerge in September (Coyle 1981). The means of dispersal of the spiderlings from the parental moss mat is not known. ''Ballooning,'' a process by which the spiders use a sheet of silk played out into the wind to carry them into the air, has been suggested as a possible means of long-range dispersal (Harp 1992), but the species' high sensitivity to desiccation would likely preclude this dispersal method (Harp, personal communication, 1994). The life span of the species is also unknown, but Coyle (1981) estimated that it may take 3 years for the species to reach maturity.

Previous Federal Activity

From 1989 through 1992, status surveys were conducted for the spruce-fir moss spider (Harp 1991, 1992). Based on the results of these surveys, the spider is presently known to exist at only four locations—three sites in North Carolina and one in Tennessee. Of the four remaining populations, only one appears to be relatively stable. This population is located along the Avery/Caldwell County line in North Carolina. The other two populations in North Carolina are located in Swain County. Both of the Swain County populations are extremely small with only one spruce-fir moss spider having been found at each of these two sites in recent years (Harp 1991, 1992). The forests at the two Swain County sites are rapidly declining. The Tennessee population is located in Sevier County. This population was considered healthy in 1989 but is currently believed to be declining in numbers and is endangered by habitat loss/alteration (Harp 1992). The high-elevation spruce-fir forests throughout much of the species' historic range are being decimated by the balsam wooly adelgid (*Adelges piceae*)—an exotic insect pest—and possibly by air pollution (acid precipitation) and other factors not yet fully understood. The death and thinning of the forest canopy results in locally drastic changes in microclimate including increased temperatures and decreased moisture leading to desiccation of the moss mats on which the spruce-fir moss spider, and possibly its prey base, depend for survival.

In absence of status information, the spruce-fir moss spider was not included in the Service's notice of review for animal candidates that was published in the **Federal Register** of November 21, 1991 (56 FR 58804). However, subsequent surveys of both historic and potential habitat of the species indicate that the spruce-fir moss spider is undergoing a rapid decline in distribution. Presently only one relatively stable population is known to survive and, while currently considered to be healthy, this population is threatened by the same factors that are believed to have resulted in the extirpation and/or decline of the species elsewhere within its historic range. Accordingly, on August 30, 1993, the Service approved the spruce-fir moss spider as a category 1 candidate. Category 1 represents those species for which the Service has enough substantial information on biological vulnerability and threats to support proposals to list them as endangered or threatened species.

The Service has met and been in contact with various Federal and State agency personnel and private individuals knowledgeable about the species concerning the species' status and the need for the protection provided by the Act. On December 31, 1992, the Service notified appropriate Federal, State, and local government agencies, landowners, and individuals knowledgeable about this or similar species, in writing, that a status review was being conducted and that the species might be proposed for Federal listing. A total of 10 written comments were received. The National Park Service, the North Carolina Division of Parks and Recreation, and three private individuals (including the owner of the site containing the Avery/Caldwell County, North Carolina, population) expressed strong support for the potential listing of the spruce-fir moss spider as an endangered species. The U.S. Soil Conservation Service, Tennessee Wildlife Resources Agency, Tennessee Department of Environment and Conservation, Tennessee Valley Authority, and the North Carolina Department of Agriculture stated that they had no new or additional information on the species or threats to its continued existence. No negative comments were received.

On January 27, 1994, the Service published in the **Federal Register** (59 FR 3825) a proposal to list the spruce-fir moss spider as an endangered species. That proposal provided information on the species' biology, status, and threats to its continued existence.

Summary of Comments and Recommendations

In the January 27, 1994, spruce-fir moss spider proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to development of a final rule. Appropriate Federal and State agencies, county governments, scientific organizations, individuals knowledgeable about the species or its habitat, and other interested parties were contacted and requested to comment. A legal notice, which invited general public comment, was published in the following newspapers: the ''Avery Journal,'' Newland, North Carolina, February 10, 1994; the ''Lenoir News-Topic,'' Lenoir, North Carolina, February 10, 1994; the ''Watauga Democrat,'' Boone, North Carolina, February 16, 1994; the ''Smoky Mountains Times,'' Bryson City, North Carolina, February 10, 1994; and the ''Mountain Press,'' Sevierville, Tennessee, February 11, 1994.

All written comments received during the comment period are covered in the following discussion.

Ten written responses to the proposed rule were received. The National Park Service, North Carolina Wildlife Resources Commission, North Carolina Division of Parks and Recreation, and three private individuals expressed strong support for the listing of the spruce-fir moss spider as endangered. One of these responses received from a private individual identified errors in the proposed rule concerning the size range of spruce-fir moss spider, and the likely age at which sexual maturity is reached by the species. Another of these respondents provided additional information concerning the status of the species. The Service has incorporated these corrections and additional information into this final rule.

Two responses were received from the Tennessee Valley Authority (TVA) and one from the U.S. Soil Conservation Service (SCS) that expressed neither support nor opposition to the listing. A response from the TVA, Regional Natural Heritage Project, and the response from the SCS stated they had no additional information concerning the spruce-fir moss spider. A response received from the TVA Land Management, while stating that they did not oppose listing of the spider, expressed concern about the lack of peer reviewed information presented in the proposed rule (concerning the spruce-fir moss spider and role of atmospheric pollution as factor in decline of its habitat), stating that the proposal relied

mainly on two unpublished, unreviewed project reports by Harp (1991, 1992). They also stated that they felt that the habitat of the spruce-fir moss spider described in the proposed rule was too general; identified errors in the citation of the Krahl-Urban et al. (1988) document cited in the ''Summary of Factors Affecting the Species,'' factor A, of the proposed rule; and provided additional information concerning the decline of the spruce-fir forest in the Southeast.

In enacting the Endangered Species Act, Congress required the Service to list species as endangered or threatened based on the best scientific and commercial information available. The Service has carefully assessed the best available information in determining to propose and list the spruce-fir moss spider as endangered. This included a review of literature, State and Federal data bases, and museum records; intensive surveys of historic and potential habitat; correspondence with other Federal, State, and private agencies, companies, and individuals knowledgeable about the species; and all relevant comments received throughout the review process. Although all of these information sources have been considered, most of the data for the species is contained in Coyle (1981), and in the status survey reports by Harp (1991 and 1992). The Service considers both of these investigators as highly reliable sources. The only other paper that provides any detail concerning the species, of which the Service is aware, that was not referenced in the proposed rule is a paper on the mating behavior of the spruce-fir moss spider (Coyle 1985).

Despite the fact that the status survey reports by Harp are not published documents, the information on the spider contained in these reports has been reviewed by numerous individuals. As part of the listing process for this species, the Service notified affected Federal, State, and local government agencies, landowners, and individuals knowledgeable about this or similar species and requested their review of the findings presented in Harp's status survey reports and any additional information that they may have on the species, its status, or threats to its continued existence. As stated above, no negative comments in response to the notification of status review were received and all respondents expressed support of the information presented in the notification, support of Federal listing of the species, and/or stated that they had no additional information on the species. In addition, the proposed rule to list the spruce-fir moss spider was widely distributed and reviewed. The majority of the responses support the findings presented in the proposed rule. No factual or substantive information was received that indicates that the information concerning the species, its habitat, its biology, its past and present distribution, and decline and status of its populations and threats as presented in the proposed rule is incorrect, with the exception of those items identified above (size, age at sexual maturity, and the Krahl-Urban et al. (1988) document citation). Accordingly, the Service believes that sufficient information is currently available and has been presented that clearly shows that the species has undergone a drastic decline throughout its range, that the species' remaining habitat is significantly threatened, and that the species is in danger of extinction.

The Service does concur that a detailed characterization of the spruce-fir moss spider's habitat, threats to its habitat, and additional information concerning the species biology will be necessary in order to properly manage and implement protection and recovery measures. These, as well as other research needs and activities necessary to ensure the long-term survival of the species, will be addressed by the Service in the development and implementation of a recovery plan for the spruce-fir moss spider and through other means (see ''Available Conservation Measures'' below). The Service has corrected the reference to the Krahl-Urban et al. (1988) document, changed the citation to the relevant chapter author (R. I. Bruck), and incorporated additional information concerning the sites where the species has been found and factors believed to be contributing to the decline of the spruce-fir forest ecosystem in the Southeast into this final rule, as requested by the TVA. The Service has also added additional citations to this final rule to support statements concerning possible factors contributing to the decline of spruce-fir forests associated with populations of the spruce-fir moss spider.

One comment opposing the proposal to list the spruce-fir moss spider was received. This individual stated that ''The scientific community, and the Service in particular, need to recognize that extinction has always been a continuing process and will continue to be so.'' The Service agrees that extinction can be a natural process. Extinction occurs naturally as species respond by evolving into new species, or are unable to respond (become extinct) to a changing environment. However, virtually all of the historical extinctions that have been documented are attributable either directly or indirectly to human induced environmental changes (Greenway 1967; Frankel and Soulé 1981; Soulé 1983), changes that are too new (changes that most species have not evolved the ability to cope with; i.e., exotic pests, pollutants, etc.), too rapid, and too destructive to allow the species the chance to respond. A species being eliminated by processes such as the human related introductions of exotic pests, applications of poisonous chemicals, forest clearing, etc., is far different than a species being unable to adapt to a naturally changing environment. Further, the Act requires the Service to list species that are in danger of going extinct without regard as to what factor may be inducing extinction.

This same respondent also inquired whether there is documentation that pollution is a contributing factor to the loss of forest cover. The Service recognizes that the possible role of atmospheric pollution in the decline of the high elevation spruce in spruce-fir forest ecosystem in the southern Appalachians is a controversial and highly complex topic. However, several studies have been conducted and are currently ongoing to address this issue and, while opinions vary and much more research is needed, there is field and laboratory data available that indicates that atmospheric pollution in combination with other stress factors has played a role in the deterioration of the health of high elevation red spruce in the southern Appalachians (Johnson et al., 1992).

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that the spruce-fir moss spider should be classified as an endangered species. Procedures found at section 4(a)(1) of the Act and regulations implementing the listing provisions of the Act (50 CFR part 424) were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to the spruce-fir moss spider are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The spruce-fir moss spider is known to be endemic only to high-elevation spruce-fir forests of western North Carolina and eastern Tennessee. Historically, the

species has been reported from four sites in North Carolina and one in Tennessee. In North Carolina the species has been recorded from two sites in Swain County, one in Yancey County, and one in Avery/Caldwell Counties (Coyle 1981, Harp 1992). In Tennessee, the species is known from only one site in Sevier County (Coyle 1981).

During 1989 and through 1992, both historic and potential habitat of the species was surveyed (Harp 1991, 1992). No new populations of the spruce-fir moss spider were discovered and of the five previously recorded populations, only one—the Avery and Caldwell County, North Carolina, population—appears to be stable (Harp 1992).

The Yancey County, North Carolina, population appears to have been extirpated, and only one individual could be found at each of the two sites in Swain County, North Carolina (Harp 1992). The population in Sevier County, Tennessee, was surveyed in 1989 and was considered to be relatively healthy at that time (Harp 1991). However, revisits to this site in 1992 found that the population level is declining, apparently in conjunction with a rapid decline of Fraser fir occurring at the site and associated desiccation of moss-mat habitat (Harp 1992). Recent monitoring of this population indicates that it will likely be extirpated within the next 1 to 2 years (Harp, personal communication 1994).

The spruce-fir moss spider is very sensitive to desiccation and requires situations of high and constant humidity (Coyle 1981; Harp 1991, 1992). Loss of forest canopy (primarily the Fraser fir, the dominant canopy species in the forest stands where the spider has been found) leading to increased light and decreased moisture on the forest floor (resulting in desiccation of the moss mats) appears to be the major cause for the loss and decline of the spruce-fir moss spider at all four of these sites and the major threat to the species' continued existence. In a 1991 letter to Mr. Keith Langdon (National Park Service, Great Smoky Mountains National Park), Dr. Frederick Coyle (Western Carolina University) indicated that the spruce-fir moss spider was common at one of the sites in Swain County, North Carolina, as late as 1983 but was extremely rare by 1988. In his letter to Mr. Langdon, Dr. Coyle stated that many of the moss mats at this site had become dry and loose, which he suspected was due largely to deterioration of the forest canopy at the site.

Fraser fir at all four of these sites from which the spider has been recorded (the Swain and Yancey County sites in North Carolina and the Sevier County, Tennessee, site) have suffered extensive mortality, believed to be primarily due to infestation by the balsam wooly adelgid (J. Harp, Oak Ridge National Laboratory, personal communication, 1993), a non-native insect pest believed to have been introduced into the United States, around 1900, from Europe (Kotinsky 1916; Eagar 1984). The adelgid was first detected in North Carolina on Mount Mitchell in 1957 (Speers 1958), though it was likely established at that site as early as 1940, and from Mount Mitchell it spread to the Fraser fir communities throughout the southern Appalachians (Eagar 1984). Most mature Fraser fir are easily killed by the adelgid (Amman and Speers 1965) with death occurring within 2 to 7 years of the initial infestation (Eagar 1984).

While the loss of the Fraser fir appears to be the most significant threat to the remaining spruce-fir moss spider populations, the combined effects of several other factors are also believed to be stressing and contributing to the decline of the high elevation spruce-fir forest stands. Bruck (1988) estimated that trees 45 through 85 years of age at the summit of Mount Mitchell, (the site in Yancey County, North Carolina, where the species is now believed to be extirpated) showed an average defoliation of 75 to 90 percent and that all the trees exhibited some form of growth reduction. He hypothesized that atmospheric pollution was a possible factor in the decline. Regional scale air pollution in combination with other stress factors is believed to have played a significant role in the deterioration of the health of high elevation red spruce in the east (Johnson et al. 1992). Site deterioration due to past land use history (past logging and burning practices in southern Appalachians) and winter injury have also been identified as possible contributing factors (Peart et al. 1992). The death and thinning of the canopy trees within these stands also cause the remaining trees to be more susceptible to wind and other storm damage, which has become a major concern at the Sevier County, Tennessee, site (J. Harp, personal communication 1992).

The spruce-fir forest at the site harboring the Avery/Caldwell County, North Carolina, population of the spruce-fir moss spider has not experienced the degree of decline that has occurred (and is occurring) at the other sites known to support (or to have supported) populations of the spider. However, the same factors that are believed to have resulted in the decline of the spruce-fir forest and the associated loss of suitable moss-mat habitat at these other sites threaten this population and its habitat at this site as well.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* The spruce-fir moss spider is not currently known to be commercially valuable; however, because of its extreme rarity and uniqueness, it is conceivable that it could be sought by collectors. It is one of only two members of the genus *Microhexura,* it is the only representative of the primitive family *Dipluridae* in eastern North America and is one of the smallest of the world's ''tarantulas.'' While collecting or other intentional take is not presently identified as a factor contributing to the species' decline, the low numbers, slow reproductive rate, and extremely restricted range of the spruce-fir moss spider make it unlikely that the species could withstand even moderate collecting pressure.

C. *Disease or predation.* It is presently unknown whether disease or predation have played a role in the decline of the spruce-fir moss spider. Further research is needed in this area. While predation is not thought to be a significant threat to a healthy population of the spruce-fir moss spider, it could limit the recovery of the species or contribute to the local extirpation of populations already depleted by other factors. Possible predators of the spruce-fir moss spider include pseudoscorpions, centipedes, and other spiders (Harp 1992).

D. *The inadequacy of existing regulatory mechanisms.* Neither the State of North Carolina nor the State of Tennessee include arachnids on their lists of endangered and threatened species; therefore, the species is unprotected in both States. Federal listing will provide protection for the spruce-fir moss spider throughout its range by requiring Federal permits to take the species and by requiring Federal agencies to consult with the Service when activities they fund, authorize, or carry out may affect the species.

E. *Other natural or manmade factors affecting its continued existence.* Only one of the four remaining populations of this species appears stable. The other three surviving populations are extremely small and all four populations are geographically isolated from one another. Therefore, the long-term genetic viability of these populations is in doubt. Also, the restricted range of each of the surviving populations makes them extremely vulnerable to extirpation from a single event or activity, such as a severe storm,

fire, land-clearing or timbering operation, pesticide/herbicide application, etc. Because they are isolated from one another natural repopulation of an extirpated population would be unlikely without human intervention.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. The species has been greatly reduced in numbers throughout the majority of its historic range and presently is known to occur at only four locations. At two of these locations, only lone individuals—one at each location—have been observed in recent years; at a third location the species has undergone a rapid decline in numbers and is endangered by further habitat degradation/alteration. Only one of the remaining populations appears to be stable at this time, and it is threatened by many of the same factors that are believed to have resulted in the extirpation or decline of the other historically known populations. Due to the species' history of population loss and decline and the extreme vulnerability of the surviving populations, threatened status does not appear appropriate for this species. Critical habitat is not being proposed for this species at this time for the reasons discussed below.

Critical Habitat

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, the Secretary designates critical habitat at the time the species is determined to be endangered or threatened. The Service's regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species. The Service finds that designation of critical habitat is not prudent for this species. Such a determination would result in no known benefit to the spruce-fir moss spider, and designation of critical habitat could further threaten the species.

Section 7 of the Act requires that Federal agencies insure that their actions are not likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. (See ''Available Conservation Measures'' section for a further discussion of section 7.) As part of the development of this rule, Federal and State agencies were notified of the spruce-fir moss spiders' general distribution, and they were requested to provide data on proposed Federal actions that might adversely affect the species. No specific projects were identified. Should any future projects be proposed in areas inhabited by the spruce-fir moss spider, the involved Federal agency will already have the general distribution data needed to determine if the species may be impacted by their action. If needed, more specific distribution information would be provided.

Three of the four surviving populations of the spruce-fir moss spider are considered to be extremely small, and suitable habitat at each of the four sites still supporting the species is very limited. Thus, any Federal action with the potential to result in significant adverse modification or destruction of the species' habitat would also likely jeopardize its continued existence, thereby triggering both the destruction or adverse modification of critical habitat standard and the jeopardy standard. Therefore, no additional protection for the spruce-fir moss spider would accrue from critical habitat designation that would not also accrue from listing the species. Consequently, when listed, habitat protection for the spruce-fir moss spider will be accomplished through the section 7 jeopardy standard and section 9 prohibitions against take.

In addition, the spruce-fir moss spider is very rare and unique, and taking for scientific purposes and private collection could pose a threat if specific site information were released. The publication of critical habitat maps in the **Federal Register**, local newspapers, and other publicity accompanying critical habitat designation could increase the collection threat. The locations of populations of these species have consequently been described only in general terms in this proposed rule. Any existing precise locality data would be available to appropriate Federal, State, and local government agencies from the Service office described in the **ADDRESSES** section; from the Service's Raleigh Field Office, P.O. Box 33726, Raleigh, North Carolina 27636–3726; the Service's Cookeville Field Office, 446 Neal Street, Cookeville, Tennessee 38501; and from the North Carolina Wildlife Resources Agency, North Carolina Natural Heritage Program, Tennessee Wildlife Resources Agency, and Tennessee Department of Conservation.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. The Service has notified Federal agencies that may have programs that affect the species. Federal activities that occur and impact the species include, but are not limited to, the carrying out or issuance of permits for construction, recreation or development actions that could result in the loss or thinning of the high-elevation forest canopy, and pesticide or herbicide applications for the control of noxious insects or weeds. It has been the experience of the Service, however, that nearly all section 7 consultations can be resolved so that the species is protected and the project objectives met.

Section 9 of the Act and implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of a commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is

illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

Permits may be issued to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances. Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and/or for incidental take in connection with otherwise lawful activities.

It is the policy of the Service, published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time of listing those activities that would constitute a violation of Section 9 of the Act. The intent of this policy is to increase public awareness of the listing on proposed and on-going activities within a species' range. Activities that could potentially result in ''take'' of the spruce-fir moss spider include, but are not limited to, unauthorized collecting or handling of the spider, unauthorized pesticide applications within the occupied habitat of the spider, or intentional or unauthorized destruction of the species' habitat (e.g., burning or forest clearing within the occupied range of the species; trampling or other disturbance of the moss mats within which the species occurs, etc.).

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Asheville Office (see **ADDRESSES** section). Requests for copies of the regulations regarding listed wildlife and inquiries about prohibitions and permits should be addressed to the U.S. Fish and Wildlife Service, Southeast Regional Office, Ecological Services, Division of Endangered Species, 1875 Century Boulevard, Atlanta, Georgia 30345–3301 (Telephone 404/679–7099; Facsimile 404/679–7081).

National Environmental Policy Act

The Fish and Wildlife Service has determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

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List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.11(h) is amended by adding the following, in alphabetical order under ARACHNIDS, to the List of Endangered and Threatened Wildlife, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * * √

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
ARACHNIDS							
*	*	*	*	*		*	
Spider, spruce-fir moss	*Microhexura montivaga*	U.S.A. (NC and TN)	NA	E	576	NA	NA
*	*	*	*	*		*	

Dated: December 12, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

[FR Doc. 95–2836 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 675

[Docket No. 941241–4341; I.D. 020195A]

Groundfish of the Bering Sea and Aleutian Islands Area; Atka Mackerel in the Eastern Aleutian District and Bering Sea

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is closing the directed fishery for Atka mackerel in the Eastern Aleutian District and Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the interim specification of Atka mackerel in these areas.

EFFECTIVE DATE: 12 noon, Alaska local time (A.l.t.), February 2, 1995, until 12 midnight, A.l.t., December 31, 1995.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, 907–586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the BSAI exclusive economic zone is managed by NMFS according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 675.

In accordance with § 675.20(a)(7)(i), the interim 1995 specifications of groundfish for the BSAI (59 FR 64346, December 14, 1994) established 2,864 metric tons (mt) as the interim allowance of Atka mackerel for the Eastern Aleutian District and the Bering Sea (BS) subarea.

The Director, Alaska Region, NMFS (Regional Director), has determined, in accordance with § 675.20(a)(8), that the Atka mackerel total allowable catch (TAC) in the Eastern Aleutian District and BS subarea soon will be reached. Therefore, the Regional Director has established a directed fishing allowance of 2,464 mt after determining that 400 mt will be taken as incidental catch in directed fishing for other species in the Eastern Aleutian District and BS subarea. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Eastern Aleutian District and the BS subarea.

Directed fishing standards for applicable gear types may be found in the regulations at § 675.20(h).

Classification

This action is taken under § 675.20 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: February 1, 1995.

David S. Crestin,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 95–2844 Filed 2–1–95; 4:28 pm]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 60, No. 24
Monday, February 6, 1995

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 318 and 381

[Docket No. 93–008P/E]

RIN 0583–AB68

Poultry Products Produced by Mechanical Separation and Products in Which Such Poultry Products Are Used

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On December 6, 1994, the Food Safety and Inspection Service (FSIS) proposed to amend the poultry products inspection regulations to prescribe a definition and standard of identity and composition, as well as labeling and other requirements for mechanically separated poultry products—mechanically separated (kind) (MS(K))—and requirements for meat or poultry products containing MS(K) as an ingredient. The proposed action would help ensure that meat and poultry products distributed to consumers are not labeled in a false or misleading manner and are not misbranded. FSIS has received requests to extend the comment period so that interested parties may have more time to consider the points in the proposal and to develop their comments more thoroughly. FSIS has determined that these requests should be granted and is, therefore, extending the comment period for an additional 30 days.

DATES: Comments must be received on or before: March 6, 1995.

ADDRESSES: Written comments to: Policy, Evaluation and Planning Office, Attn. Diane Moore, FSIS Docket Clerk, Room 3171, South Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. Oral comments should be directed to Mr. John W. McCutcheon, (202) 720–2709.

FOR FURTHER INFORMATION CONTACT: John W. McCutcheon, Deputy Administrator, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, Area Code (202) 720–2709.

SUPPLEMENTARY INFORMATION: On December 6, 1994, FSIS published in the **Federal Register** a proposed rule (59 FR 62629) to amend the poultry products inspection regulations to prescribe a definition and standard of identity and composition for the finely comminuted poultry product that results from the mechanical separation and removal of most of the bone from poultry carcasses and parts of carcasses (''Mechanically Separated (Kind)(MS(K))),'' including requirements for bone solids content (measured as calcium content) and bone particle size; to specify certain limitations for the use of MS(K); to establish recordkeeping requirements for bone solids content and bone particle size; and to establish labeling requirements for MS(K), and for poultry products and meat food products containing MS(K) as an ingredient. The proposal is intended to establish the Agency's requirements with respect to poultry products produced by mechanical separation, including the requirement that they be distinctly labeled, e.g., ''mechanically separated chicken.'' The proposed labeling and other requirements are intended to help ensure that meat and poultry products distributed to consumers are not labeled in a false or misleading manner and are not misbranded.

The proposed rule provided extensive discussion on: the historical background relating to the development, use, and regulation of MS(K); the health and safety aspects of MS(K); the state of technology for producing MS(K); the results of analysis of comments received in response to two advance notices of proposed rulemaking (ANPR's) on MS(K) that the Agency had published, respectively, on June 15, 1993, (58 FR 33040), and, on March 3, 1994, (59 FR 10230); and the proposed regulatory requirements. The first ANPR had addressed the need for labeling poultry products containing MS(K) as an ingredient and the second had concerned definitions, standards, labeling, and other requirements for MS(K).

Interested persons were given until February 6, 1995, to submit comments on the proposed regulatory amendments. FSIS has received requests from several meat and poultry trade associations and manufacturers of processed meat and poultry products to extend the comment period for the proposal. They have asked for additional time to study and develop information on issues relating to the proposal.

FSIS considers these requests to be reasonable and is interested in receiving the additional comments that would be submitted during an extended comment period. Accordingly, the comment period for the proposal is being extended for 30 days.

Done at Washington, DC, on February 2, 1995.

Michael R. Taylor,

Acting Under Secretary for Food Safety.

[FR Doc. 95–2929 Filed 2–3–95; 8:45 am]
BILLING CODE 3410–DM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 95–ASO–2]

Proposed Amendment of Class D and Class E4 Airspace; Louisville, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to reduce the size of the Class D and Class E4 airspace at Louisville, KY. The VOR RWY 19 Standard Instrument Approach (SIAP) for the Louisville Bowman Field Airport has been cancelled. Therefore, a portion of the Louisville Bowman Field Class D and Class E4 airspace currently designated northnortheast of the airport is no longer needed.

DATES: Comments must be received on or before March 22, 1995.

ADDRESSES: Send comments on the proposal in triplicate to: Federal Aviation Administration, Docket No. 95–ASO–2, Manager, System Management Branch, ASO–530, P.O. Box 20636, Atlanta, Georgia 30320.

The official docket may be examined in the Office of the Assistant Chief Counsel for Southern Region, Room 550,

1701 Columbia Avenue, College Park, Georgia 30337, telephone (404) 305–5586.

FOR FURTHER INFORMATION CONTACT: Michael J. Powderly, System Management Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5570.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 95–ASO–2.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Office of the Assistant Chief Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Manager, System Management Branch, ASO–530, Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11–2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to reduce the size of the Class D and Class E4 airspace at Louisville, KY. The VOR RWY 19 SIAP for the Louisville Bowman Field Airport has been cancelled. Therefore a portion of the Louisville Bowman Field Class D and Class E4 airspace currently designated northnortheast of the airport is no longer needed. Designations for Class D and Class E4 airspace are published in Paragraphs 5000 and 6004 respectively of FAA Order 7400.9B dated July 18, 1994 and effective September 16, 1994 which is incorporated by reference in CFR 71.1. The Class D and Class E4 airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subject in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 continues to read as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9B, Airspace Designations and Reporting Points, dated July 18, 1994 and effective September 16, 1994, is amended as follows:

Paragraph 5000 Class D Airspace

* * * * *

ASO KY D Louisville Bowman Field, KY [Revised]

Louisville Bowman Field, KY
(Lat. 38°13′41″ N, long. 85°39′48″ W)
Louisville Standiford Field, KY
(Lat. 38°10′29″ N, long. 85°44′11″ W)

That airspace extending upward from the surface to but not including 2,200 feet MSL within a 3.9-mile radius of Bowman Field, excluding that portion within the Louisville Standiford Field Class C Airspace Area, and excluding that portion south of the 081° bearing from Standiford Field, and also excluding that portion north of Louisville Standiford Field Class C Airspace Area and west of a line drawn from lat. 38°11′28″ N, long. 85°42′01″ W direct thru the point where the 030° bearing from Standiford Field intersects the 5-mile radius from Standiford Field to the point of intersection with the 3.9-mile radius from Bowman Field. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airman. The effective dates and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6004 Class E Airspace Areas Designated as an Extension to Class D Surface Area

* * * * *

ASO KY E4 Louisville Bowman Field, KY [Revised]

Louisville Bowman Field, KY
(Lat. 38°13′41″ N, long. 85°39′48″ W)
Bowman VOR/DME
(Lat. 38°13′49″ N, long. 85°39′53″ W)

That airspace extending upward from the surface within 2.4 miles each side of the Bowman VOR/DME 067° radial, extending from the 3.9-mile radius of Bowman Field to 7 miles east of Bowman VOR/DME. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airman. The effective dates and times will thereafter be continuously published in the airport/Facility Directory.

* * * * *

Issued in College Park, Georgia, on January 10, 1995.

Michael J. Powderly,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 95–2808 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Chapter II

Meetings of the Indian Gas Valuation Negotiated Rulemaking Committee

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of meetings.

SUMMARY: The Secretary of the Department of the Interior (Department) has established an Indian Gas Valuation Negotiated Rulemaking Committee (Committee) to develop specific recommendations with respect to Indian gas valuation under its responsibilities imposed by the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.* (FOGRMA). The Department has determined that the establishment of this Committee is in the public interest and will assist the Agency in performing its duties under FOGRMA.

DATES: The Committee will meet on February 22–23, and March 8–9, 1995, 8:30 a.m. to 5:00 p.m. each day.

ADDRESSES: The February meetings will be held at the Council of Energy Resource Tribes (CERT), Board Room, 25th floor, 1999 Broadway, Denver, Colorado, 80202, telephone (303) 297–2378.

The March meetings will be held at the Lakewood Compliance Division, Golden Hill Office Building, Suite B200, 12600 West Colfax Avenue, Lakewood, Colorado 80215, telephone (303) 275–7401.

Written statements may be submitted to Mr. Donald T. Sant, Deputy Associate Director for Valuation and Operations, Minerals Management Service, Royalty Management Program, P.O. Box 25165, MS–3100, Denver, CO 80225–0165.

FOR FURTHER INFORMATION CONTACT: Mr. Donald T. Sant, Deputy Associate Director for Valuation and Operations, Minerals Management Service, Royalty Management Program, P.O. Box 25165, MS–3100, Denver, Colorado, 80225–0165, telephone number (303) 231–3899, fax number (303) 231–3194.

SUPPLEMENTARY INFORMATION: The location and dates of future meetings will be published in the **Federal Register**.

The meeting will be open to the public without advanced registration. Public attendance may be limited to the space available. Members of the public may make statements during the meeting, to the extent time permits, and file written statements with the Committee for its consideration.

Written statements should be submitted to the address listed above. Minutes of Committee meetings will be available for public inspection and copying 10 days following each meeting at the same address. In addition, the materials received to date during the input sessions are available for inspection and copying at the same address.

Dated: February 1, 1995.

Donald T. Sant,

Acting Associate Director for Royalty Management.

[FR Doc. 95–2931 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 940822–4334; I.D. 101194C]

Endangered and Threatened Species; Status of Snake River Spring/Summer Chinook Salmon and Snake River Fall Chinook Salmon; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; correction.

SUMMARY: On December 28, 1994, NMFS issued a proposed rule to permanently reclassify Snake River spring/summer and Snake River fall chinook salmon (*Oncorhynchus tshawytscha*) as endangered. The closing date for comments on this proposed rule was inadvertently listed as February 21, 1995. NMFS is correcting the comment period to February 26, 1995, to allow for a 60-day comment period from the date of publication. In addition, the due date for requests for a public hearing is corrected from February 6, 1995, to February 11, 1995, to allow for a 45-day comment period, from the date of publication.

DATES: Comments must be received by February 26, 1995. Requests for a public hearing must be received by February 11, 1995.

FOR FURTHER INFORMATION CONTACT: Garth Griffin, 503–230–5430, or Marta Nammack, 301–713–1401.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published the proposed regulations contain errors which are in need of clarification.

Correction of Publication

Accordingly, the publication on December 28, 1994, of the proposed regulations (I.D. 101194C), which were subject of FR Doc. 94–31869, are corrected as follows:

[Corrected]

On page 66784, under the preamble caption, DATES, correct the comment period date ''February 21, 1995'' to read ''February 26, 1995'', and correct the requests for a public hearing date of ''February 6, 1995'' to read ''February 11, 1995''.

Dated: January 27, 1995.

William W. Fox, Jr.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 95–2849 Filed 2–3–95; 8:45 am]

BILLING CODE 3510–22–F

50 CFR Part 652

[Docket No. 950126030–5030–01; I.D. 111794A]

Atlantic Surf Clam and Ocean Quahog Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed 1995 fishing quotas for surf clams and ocean quahogs; request for comments.

SUMMARY: NMFS proposes quotas for the Atlantic surf clam and ocean quahog fisheries for 1995. These quotas were selected from a range defined as optimum yield (OY) for each fishery. The intent of this action is to establish allowable harvests of surf clams and ocean quahogs from the Exclusive Economic Zone (EEZ) in 1995.

DATES: Public comments must be received on or before March 6, 1995.

ADDRESSES: Copies of the Mid-Atlantic Fishery Management Council's analysis and recommendations are available from David R. Keifer, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19901–6790.

Send comments to Jon C. Rittgers, Acting Regional Director, Northeast Region, NMFS, 1 Blackburn Drive, Gloucester, MA 01930–2298. Mark on the outside of the envelope, ''Comments—1995 Surf Clam and Ocean Quahog Quotas.''

FOR FURTHER INFORMATION CONTACT: Myles Raizin, Resource Policy Analyst, 508–281–9104.

SUPPLEMENTARY INFORMATION: The Fishery Management Plan for the Atlantic Surf Clam and Ocean Quahog Fisheries (FMP) directs NMFS, in consultation with the Mid-Atlantic Fishery Management Council (Council), to specify quotas for surf clams and ocean quahogs on an annual basis from a range to represent the OY for each fishery.

In a 1992 policy, the Council selected annual harvest levels that would allow those harvests to continue for at least 10 years for surf clams and 30 years for ocean quahogs. As a further refinement of the 1992 policy, the Council voted in 1993 that, within the biological constraints imposed by the finite resource, annual quotas would be set at levels that will meet estimated annual demand.

For surf clams, the quota must fall within the OY range of 1.85 million bu (652 thousand hectoliters (hL)) and 3.40 million bu (1.2 million hL). For ocean quahogs, the quota must fall within the OY range of 4.00 million bu (1.4 million hL) and 6.00 million bu (2.1 million hL).

In proposing the 1995 quotas, NMFS considered the available stock assessments, data reported by harvesters and processors, and other relevant information concerning exploitable biomass and spawning biomass, fishing mortality rates, stock recruitment, projected effort and catches, and areas closed to fishing. This information was presented in a written report prepared by the Council and adopted by the Director, Northeast Region, NMFS.

Proposed quotas as recommended by the Council are: Surf clams—2.565 million bu (933.8 thousand hL); ocean quahogs—4.9 million bu (1.73 million hL). These proposed quotas represent decreases from the 1994 quotas of 2.85 million bu (1.0 million hL) for surf clams, and 5.4 million bu (1.9 million hL) for ocean quahogs.

On January 30 and 31, 1995, the Northeast Fisheries Science Center presented a new stock assessment of surf clams and ocean quahogs. Copies may be obtained from the Northeast Fisheries Science Center, 166 Water Street, Woods Hole, MA 02543, telephone: 508–548–5123. Results of this stock assessment were not available to the Council at the time the proposed 1995 quotas were established.

NMFS is concerned that the overfishing definitions for these two species, as contained in the FMP, may be inadequate to protect the long-term productivity of these resources, based on the findings of a recent Scientific Review Committee. Therefore, NMFS will advise the Council that prior to setting the 1996 quotas, it should revise these definitions to ensure they have a biological basis.

Surf Clams

The proposed 1995 quota for surf clams of 2.565 million bu (933.8 thousand hL) was recommended by the Council staff.

The potential harvest of 300,000 bu (105.7 thousand hL) from the Georges Bank area, which constitutes nearly 20 percent of the surf clam biomass, was not added to this proposed quota on the assumption that the area east of 69° W. long. will remain closed to fishing in 1995 due to the continued danger of paralytic shellfish poisoning (PSP).

Under the current FMP, the Mid-Atlantic, Nantucket Shoals, and Georges Bank areas are combined. Therefore, the 300,000 bu (105.7 thousand hL) from Georges Bank could be safely harvested in other areas west of 69° W. long. However, with the decline in abundance of surf clams in the Mid-Atlantic region, and the absence of a significant year class since 1976 off New Jersey and 1977 off the Delmarva peninsula, the Council concurred with staff recommendations that the conservation of the resource is best served by reducing the present quota to 2.565 million bu (933.8 thousand hL).

Ocean Quahogs

The proposed 1995 quota for ocean quahogs of 4.9 million bu (1.73 million hL) was recommended by the Council.

Council staff had recommended a 1995 quota of 4.6 million bu (1.6 million hL) due to a lack of significant recruitment to the population for the past several decades, and strong indications that the proportion of quahog resource available to the industry is dwindling. As with surf clams, the quahog resource on Georges Bank remains unavailable for harvest due to PSP.

In 1993, the Council adopted as a quota setting policy that the quota should be set within the OY range (4.0 million—6.0 million bu (1.4 million—2.1 million hL)) at a level that will allow fishing to continue at that level for at least 30 years.

Based on that policy, Council staff recommended a 1995 quota of 4.6 million bu (1.6 million hL). The recommendation was based on a determination that current estimates (1992) of the total EEZ ocean quahog abundance indicate a supply that would support current catches for 22 to 32 years. The Council staff also provided an analysis, which indicated that the average annual landings from 1984 to 1993 were 4.6 million bu (1.6 million hL). This amount was used as an estimate of quantity demanded for ocean quahogs.

At the Council meeting, discussion focused on the quantity of quahogs that can be sold in the market. Average annual landings were used as an indicator of that quantity. Annual landings for the 10-year period 1984 through 1993 averaged 4.6 million bu (1.6 million hL). If, however, data from the last 3 years are used, average annual landings were 4.9 million bu (1.73 million hL). At this higher exploitation rate, the stock of ocean quahogs is expected to support landings for 20 to 30 years. Within the above constraint, the quota should be set at a level that will meet estimated annual demand. The Council voted in favor of a proposed quota of 4.9 million bu (1.73 million hL).

Continued recruitment failure in this fishery and the difficulty in resolving the PSP problem for the Georges Bank portion of the stock warrant a conservative biological stance with regard to the likely long-term supply of quahogs. Nevertheless, NMFS is specifically seeking comment on the appropriate approach to consideration of market demand in establishing annual quotas for species managed under individual transferable quota.

While quotas are set for maximum sustainable yield, the social implications of the quota must be addressed as well. If the quahog quota were to be set significantly in excess of current market demand, it would result in a segment of the industry being unable to sell part or all of its allocation, as vertically integrated operations would buy preferentially from their own boats. Current market demand would allow for a quota level of between 4.8 million bu (1.69 million hL) and 5.0 million bu (1.76 million hL). The proposed quota of 4.9 million bu (1.73 million hL) serves to strike a balance between the yield of the resource and the effects on the industry.

The proposed quotas for the 1995 Atlantic surf clam and ocean quahog fisheries are as follows:

PROPOSED 1995 SURF CLAM/OCEAN QUAHOG QUOTAS

Fishery	1995 proposed quotas (bu)	1995 proposed quotas (hL)
Surf clam	2,565,000	933,800
Ocean quahog ..	4,900,000	1,730,000

Classification

This action is authorized by 50 CFR part 652, and these proposed

specifications are exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 31, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

[FR Doc. 95–2749 Filed 2–3–95; 8:45 am]

BILLING CODE 3510–22–W

Notices

Federal Register
Vol. 60, No. 24
Monday, February 6, 1995

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

California Spotted Owl EIS; Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: This notice announces an open house in which the public is invited to participate in information exchange regarding alternatives being considered in the California Spotted Owl Draft Environmental Impact Statement, as they affect the Tahoe National Forest area.

DATES AND TIME: March 3, from 12 p.m. to 9 p.m.; March 4, from 8 p.m. to 12 p.m.

ADDRESSES: Northern Mine Building, Nevada County Fairgrounds, 11228 McCourtney Rd., Grass Valley, CA.

FOR FURTHER INFORMATION CONTACT: Julie Lydick, Nevada City Ranger District, 631 Coyote Street, Nevada City, CA, 95959–6003. (916) 265–4531.

SUPPLEMENTARY INFORMATION: The Forest Service will release a Draft Environmental Impact Statement (DEIS) to amend the Pacific Southwest Regional Guide and Sierran Province Forest Plans with new management direction for the California Spotted Owl. The purpose of this meeting is to exchange information with the public regarding the Draft Environmental Impact Statement and the preferred alternative.

The meeting will be informally structured. Members of the team that prepared the DEIS will be available to answer questions and discuss the DEIS. Visual media depicting the alternatives and selected environmental consequences will be displayed.

Janice Gauthier,

CA OWL EIS Team Leader.

[FR Doc. 95–2834 Filed 2–3–95; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–301–801]

Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses From Colombia

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 6, 1995.

FOR FURTHER INFORMATION CONTACT: James Maeder or James Terpstra, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–3330, or (202) 482–3965.

Final Determination

We determine that fresh cut roses (roses) from Colombia are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930 (the Act), as amended as of 1994. The estimated margins are shown in the ''Suspension of Liquidation'' section of this notice.

Case History

Since the notice of amended preliminary determination on October 4, 1994 (59 FR 51554, October 12, 1994), the following events have occurred.

On September 27, 1994, respondents requested a postponement of the final determination. On September 28, 1994, the Department agreed to postpone the final determination until January 26, 1994.

On September 29 and 30, 1994, we received responses to the Department's supplemental questionnaires from Grupo Sabana (Sabana), Grupo Intercontinental (Intercontinental), the Floramerica Group (Floramerica), Flores la Fragancia (Fragancia), and Grupo Sagaro (Sagaro).

On October 3–11, 1994, Grupo Benilda (Benilda), Grupo Tropicales (Tropicales), Grupo Prisma (Prisma), Grupo Bojaca (Bojaca), Intercontinental, Sabana, the Andes Group (Andes), Grupo Papagayo (Papagayo), Grupo Clavecol (Clavecol), Sagaro, Agrorosas, Flores Mocari S.A. (Mocari), and Rosex submitted preverification corrections to their respective responses.

Department of Commerce personnel conducted sales and cost verifications of the respondents' data in Miami from October 9, 1994, through November 3, 1994.

On October 7, 1994, the petitioner submitted comments regarding the verification of the respondents' sales responses.

In October 1994, Rosex and Andes submitted corrections identified at the beginning of verification.

On November 7, 1994, the Caicedo Group (Caicedo), submitted certifications from the Government of Colombia that four members of its group did not export during the POI.

On November 10, 1994, Arnold and Porter, counsel for Asocolflores a growers organization that represents 14 of the 16 individual respondents, met with Assistant Secretary for Import Administration Susan G. Esserman regarding a suspension agreement, (*See* memorandum to file, November 11, 1994).

On November 14, 1994, Beall's Roses, Inc., an American importer, entered an appearance as an interested party in this investigation.

On November 18, 1994, Asocolflores submitted four reports, the Botero Report, the Tayama Report, the Lewis & Sykes Report, and the Hortimarc Report addressing to the issue of whether or not third country prices should be used in calculating foreign market value (FMV).

The Department's sales and cost verification reports for Sabana, Sagaro, Rosex, Floramerica, Mocari, Prisma, Fragancia, and Tropicales were issued from November 16 to 29, 1994.

On November 28, 1994, the petitioner supplied the Department with comments concerning the four third country pricing reports supplied by the respondents on November 18, 1994.

In November and December 1994, Rosex, Benilda, Floramerica, Intercontinental, Prisma, Bojaca, Sagaro, Tropicales, and Fragancia submitted revised sales listings and computer tapes.

In September 1994, both the petitioner and the respondents requested a public hearing. Case and rebuttal briefs were received from the petitioner and the respondents on December 2, 6, and 12, 1994. On December 13, 1994, we held a public hearing.

Scope of Investigation

The products covered by this investigation are fresh cut roses, including spray roses, sweethearts or miniatures, intermediates, and hybrid teas, whether imported as individual blooms (stems) or in bouquets or bunches. Roses are classified under subheadings 0603.10.6010 and 0603.10.6090 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this investigation is dispositive.

Period of Investigation

The POI is January 1, 1993, through December 31, 1993. (*See* the April 14, 1994, memorandum from the team to Richard W. Moreland).

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Statute and to the Department's regulations are in reference to the provisions as they existed on December 31, 1994.

Such or Similar Comparisons

We have determined that all roses covered by this investigation comprise two categories of ''such or similar'' merchandise: culls and export-quality roses. None of the respondents reported sales of culls in the United States. Therefore, no comparisons in this such or similar category were made. Regarding export quality roses, we compared USP to CV (*See* the CV section of this notice).

Fair Value Comparisons

To determine whether sales of roses from Colombia to the United States were made at less than fair value, we compared the United States price (USP) to the CV for all respondents, as specified in the ''United States Price'' and ''Foreign Market Value'' sections of this notice.

United States Price

For sales by all respondents except Floramerica, we based USP on purchase price, in accordance with section 772(b) of the Act, when the subject merchandise was sold to unrelated purchasers in the United States prior to importation and when exporter's sales price (ESP) methodology was not otherwise indicated.

In addition, for all respondents, where sales to the first unrelated purchaser took place after importation into the United States, we based USP on ESP, in accordance with section 772(c) of the Act.

For all U.S. prices, we calculated USP using weighted-average U.S. prices by rose type, where the appropriate data was available. (*See* General Comments 4 and 5).

During the POI, some respondents paid commissions to related parties in the United States. However, we made no adjustment for these payments. Instead, we subtracted the actual indirect selling expenses incurred by the related party in the United States because we determined that to account for both commissions and actual expenses would be distortive. (*See* General Comment 7).

Finally, for those respondents who sold through related parties in the United States and who did not report inventory carrying costs on their ESP sales, we calculated these costs by using an inventory carrying period of seven days. According to a public report by Harry K. Tayama, PhD., submitted by the respondents in this investigation, this is an appropriate period. For companies with sales to unrelated parties, we accepted that inventory carrying costs were included in U.S. credit expenses.

We made company-specific adjustments, as discussed below:

1. Agrorosas S.A.

For Agrorosas, purchase price was based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, brokerage and handling charges, U.S. import duties. We also deducted U.S. direct selling expenses, including credit expenses, U.S. indirect selling expenses, Colombian indirect selling expenses, and commissions to unrelated parties. We recalculated foreign inland freight and Colombian indirect selling expenses based on verification findings.

2. Caicedo Group

For Caicedo, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for discounts and other price adjustments, unrelated party commissions, foreign inland freight, air freight, U.S. import duties, U.S. inland freight, repacking expenses, and Colombian indirect selling expenses incurred on ESP sales, including inventory carrying costs. We also deducted direct and indirect selling expenses, including inventory carrying costs.

3. Flores La Fragancia S.A.

For Fragancia, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, foreign inland freight and air freight (which includes U.S. duties and U.S. brokerage).

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight (which includes U.S. duties and U.S. brokerage). We also deducted U.S. credit expenses and U.S. and Colombian indirect selling expenses, including inventory carrying costs.

4. Flores Mocari S.A.

For Mocari, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight and U.S. import duties.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. import duties, credit expenses, warranty expenses, and other U.S. direct expenses, and U.S. and Colombian indirect selling expenses, including inventory carrying costs. We recalculated U.S. indirect selling expenses and credit expenses because we did not accept Mocari's allocation methodology (See Comment 39). As a result of this decision, and our decision on the interest rate issue, we have also recalculated warranty, credit, and inventory carrying costs. We also recalculated the inventory carrying costs using the cost of manufacturing (COM).

5. Grupo Andes

For Andes, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, and U.S. import duties.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions where necessary, for foreign inland freight, air freight, U.S. customs duties, U.S. and Colombian indirect selling expenses including inventory carrying costs, and U.S. direct selling expenses including credit expenses. We

recalculated U.S. credit expenses to reflect the data examined at verification.

For roses that were further manufactured into bouquets after importation, we adjusted for all value added in the United States, including the proportional amount of profit or loss attributable to the value added, pursuant to section 772 (e)(3) of the Act. We added packing to reported U.S. prices. For the cost of merchandise subject to further manufacturing, in addition to the adjustments cited in the section on FMV, below, for constructed value, we 1) corrected the U.S. general expenses to reflect a percentage of cost of goods sold, and 2) recalculated interest expense to exclude the CV offset.

6. Grupo Benilda

For Benilda, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. customs duties, U.S. inland freight, and other movement expenses; as BIA, we broke U.S. inland freight expenses out from total reported U.S. indirect selling expenses to be deducted as a movement charge. We also deducted Colombian and U.S. indirect selling expenses, including inventory carrying costs, U.S. direct selling expenses, including credit expenses, and other direct expenses. We also deducted U.S. inland freight charges, which we removed from the U.S. indirect selling expenses reported as incurred by AGA, Benilda's U.S. sales subsidiary. For those ESP sales where Benilda did not report air freight and U.S. duty, we applied, as BIA, the average reported value for each such expense. Based on findings at verification, an allocation method was used to segregate freight expenses included in the U.S. indirect selling expenses and recalculate U.S. indirect selling expenses. Based on findings at verification, Benilda has included U.S. brokerage expenses as a component of U.S. indirect selling expenses.

7. Grupo Bojaca

For Bojaca, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. import duties, brokerage and handling, and discounts and rebates. We also deducted U.S. direct selling expenses, including credit expenses, U.S. and Colombian indirect selling expenses, including inventory carrying costs, and commissions to unrelated parties.

8. Grupo Clavecol

For Clavecol, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for discounts and foreign inland freight. As BIA, we deducted a percentage of gross price for one purchase price customer, in order to account for unreported wire transfer charges discovered at verification.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for discounts, foreign inland freight, air freight, U.S. brokerage and handling charges, credit expenses and U.S. and Colombian indirect selling expenses, including inventory carrying costs. At the preliminary determination, because Clavecol had not adequately supported its reported interest rate for calculating imputed credit expense, we used the highest public interest rate on the record in the companion investigation of roses from Ecuador, which was a ranged value for a U.S. subsidiary of an Ecuadoran rose producer, Guanguilqui Agro-Industrial S.A., of 10 percent (*See* the September 12, 1994, concurrence memorandum and the September 9, 1994, memorandum to the file). However, on September 22, 1994, Clavecol clarified that its U.S. subsidiary had no borrowings in the United States on which to base a dollar interest rate for calculating imputed credit on ESP sales. Therefore, we are using the reported credit expenses based on Clavecol's reported U.S. dollar interest rate. For the final determination we are deducting from ESP those discounts on ESP sales examined at verification but not submitted in computer form until Clavecol's December 7, 1994, submission. Accordingly, we also reduced Clavecol's reported U.S. credit expense by the proportion of discounts from gross price.

9. Grupo Floramerica

For Floramerica, we calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. import duties, brokerage and handling, U.S. inland freight, warranty expenses including billing credits, promotional fees, credit expenses and U.S., Panamanian and Colombian indirect selling expenses, including inventory carrying costs. In addition, we added an amount for interest revenue to U.S. price.

10. Grupo Intercontinental

For Intercontinental, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for price adjustments and foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for discounts, foreign inland freight, air freight, U.S. import duties, U.S. brokerage and handling, credit expenses, and U.S. and Colombian indirect selling expenses incurred on ESP sales, including inventory carrying costs, and commissions to unrelated parties.

11. Grupo Papagayo

For Papagayo, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight expenses, and other movement expenses.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. import duties, U.S. inland freight, brokerage and handling charges, and other movement expenses. We also deducted Colombian and U.S. indirect selling expenses, including inventory carrying costs, direct selling expenses, including credit, other expenses, and commissions paid to unrelated parties. We recalculated Colombian indirect selling expenses based on findings at verification.

12. Grupo Prisma

For Prisma, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight. We recalculated foreign inland freight for certain customers based on verification findings.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, which we recalculated for certain customers based on verification findings. We also made deductions for air freight, U.S. import duties, brokerage and handling, U.S. direct selling

expenses, including credit expenses, Colombian indirect selling expenses and other indirect selling expenses. We recalculated Colombian indirect selling expenses based on verification findings. We made a deduction for unrelated party commissions. We deducted inventory carrying cost which we calculated, as respondent did not report this expense.

13. Grupo Sabana

For Sabana, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight and U.S. import duties. For certain transactions for which Sabana did not provide proof of payment, we recalculated the credit expense using the date of the final determination as the payment date.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for discounts, foreign inland freight, air freight, U.S. import duties, direct selling expenses, including credit expenses, and U.S. and Colombian indirect selling expenses including inventory carrying costs. We recalculated the credit expense using the average interest rate reported by the companies that had short-term POI borrowings. We also recalculated the inventory carrying expenses using the average interest rate, an additional number of days for movement of the subject merchandise from Bogota to Miami, and the COM.

14. Grupo Sagaro

For Sagaro, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. import duties, and brokerage and handling expenses. We also deducted credit expenses, promotional fees, and other direct expenses, U.S. indirect selling expenses and commissions to unrelated parties.

15. Grupo Tropicales

For Tropicales, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight and air freight. We deducted reported packing expenses and replaced them with verified data. We also deducted discounts, where appropriate.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for discounts and rebates, foreign inland freight, air freight, brokerage, credit expenses, promotional fees, and other direct selling expenses, and U.S. and Colombian indirect selling expenses, including inventory carrying costs. We recalculated credit, inventory carrying costs, and other U.S. indirect selling expenses, based on findings at verification. We deducted reported packing expenses and replaced them with verified data. We also deducted discounts, where appropriate.

16. Rosex Group

For Rosex, we calculated purchase price based on packed, f.o.b. prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign inland freight, air freight, U.S. import duties, and brokerage and handling. We also deducted credit expenses, and promotional fees, as well as U.S. indirect selling expenses and commissions to unrelated parties.

Foreign Market Value

To determine whether a respondent's sales of roses from Colombia to the United States were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the ''United States Price'' and ''Foreign Market Value'' sections of this notice. We based FMV on constructed value (CV) for all producers. For those respondents with viable home markets, we found insufficient sales above COP. For those respondents with viable third country markets, we rejected sales to these markets (see Comment 7). The remaining respondents had no viable home or third country markets. We calculated CV on a rose type basis, where the appropriate data was available (*see* Comment 6).

In calculating FMV, wherever there were insufficient sales above cost in the home market, we based FMV on CV, as explained in ''Cost of Production Analysis'', below.

Home Market Sales

In order to determine whether there were sufficient sales of fresh cut roses in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of export quality roses to the volume of third country sales of export quality roses in accordance with section 773(a)(1)(A) of the Act. Based on this comparison, we determined that ten of the 16 respondents had viable home markets. The ten companies were: Andes; Benilda; Bojaca; Caicedo; Floramerica; Fragancia; Intercontinental; Papagayo; Prisma; and, Sagaro.

Cost of Production Analysis

Because the petitioner's allegations, when considered in light of the information on the record, gave the Department ''reasonable grounds to believe or suspect'' that the ten respondents with known viable home markets were selling roses in Colombia at prices below their COP, the Department initiated COP investigations to determine whether these respondents had home market sales that were made at less than their respective COPs (See the September 8, 1994, memorandum from Richard W. Moreland to Barbara R. Stafford). The respondents requested that we depart from our normal practice and interpret our COP analysis in such a manner as to either accept or reject all sales. We denied this request. (*See* the January 26, 1995, COP memorandum from the team to Barbara R. Stafford).

In keeping with our past practice in cases involving perishable agricultural products, where we found less than 50 percent of a respondent's sales of roses were at prices below the COP, we did not disregard any below-cost sales because we determined that the respondent's below-cost sales were not made in substantial quantities (*See Certain Fresh Winter Vegetables From Mexico* 45 FR 20512 (1980)). Where we found between 50 and 90 percent of a respondent's sales of export quality roses were at prices below the COP, and the below cost sales were made over an extended period of time, we disregarded only the below-cost sales. Where we found that more than 90 percent of respondent's sales were at prices below the COP, and the sales were made over an extended period of time, we disregarded all sales for that product and calculated FMV based on CV. The Department enunciated its practice of modifying the standard cost test to account for the perishability of products in *Certain Fresh-Cut Flowers from Mexico (3/1/88 to 4/31/89)*, and stated that the 50 percent modification only affected the lower threshold of the standard 10–90–10 test. The Department is continuing this standard practice in this investigation (for a detailed discussion of the history of the cost test for perishable products, see the January

26, 1995, 50–90–10 memorandum from the team to Barbara R. Stafford).

Constructed Value Comparisons: Companies With Home Market Sales Below the Cost of Production

In order to determine whether the home market prices were above the COP, we calculated the COP based on the sum of a respondent's cost of cultivation, general expenses, and packing. For all respondents with viable home market sales, we found that more than 90 percent of all sales fell below COP for each company. Therefore, in accordance with section 773(b) of the Act we disregarded all home market sales and calculated FMV on CV. We calculated CV based on the sum of a respondent's cost of cultivation, plus general expenses, profit, and U.S. packing. For general expenses, which includes selling and financial expenses (SG&A), we used the greater of the reported general expenses or the statutory minimum of ten percent of the cost of cultivation. For profit, we used the statutory minimum of eight percent of the cost of cultivation and general expenses, in accordance with section 773(e)(B) of the Act (19 CFR 353.50(a)(2)) and *Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement v. United States,* Slip Op. 93–1239 (Fed. Cir., January 5, 1994).

Constructed Value Revisions

We made specific revisions to each respondent's submitted COP and CV data as described below:

1. Flores La Fragancia S.A.

For Fragancia, we: (1) Increased G&A expenses by the amount of other G&A incurred in December, 1993; (2) disallowed interest income earned on investments of working capital not deemed to be short-term; (3) adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; and (4) included the actual greenhouse plastic expense incurred during the POI.

2. Grupo Andes

For Andes, we: (1) adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (2) adjusted G&A expense to include parent company G&A costs; and (3) adjusted depreciation expense for a computational error.

3. Grupo Benilda

For Benilda, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; and (2) allocated company-wide net financial expenses to rose production and non-subject merchandise based on the ratio of cultivated area to flower type.

4. Grupo Bojaca

For Bojaca, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; and (2) reclassified the miscellaneous income items from financial income to general and administrative expense.

5. Caicedo Group

For Caicedo, we adjusted amortization and depreciation expenses to account for the effect of Colombian inflation.

6. Grupo Floramerica

For Floramerica, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (2) adjusted cultivation costs to include all 1993 year-end adjustments; and (3) disallowed interest income earned on investments of working capital not deemed to be short-term.

7. Grupo Intercontinental

For Intercontinental, we: (1) Allocated company-wide G&A costs to rose production and non-subject merchandise based on the ratio of cultivated area to flower type; (2) allocated company-wide net financial expenses to rose production and non-subject merchandise based on the ratio of cultivated area to flower type; and (3) adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (4) corrected materials, direct labor, and field structure costs to account for amounts that were incorrectly capitalized as preproductive expenses; and (5) adjusted home market packing to account for inconsistencies in respondent's reporting of this expense.

8. Grupo Papagayo

For Papagayo, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (2) reclassified bad debt expense from financing expense to indirect selling expense; and (3) included certain income and expense items which related to the general production activity of the company as a whole in general and administrative expense.

9. Grupo Prisma

For Prisma, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; and (2) allocated company-wide net financial expenses to rose production and non-subject merchandise based on the ratio of cultivated area to flower type.

10. Grupo Sagaro

For Sagaro, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (2) included the worm culture costs as a general research and development expense; and (3) allocated company-wide net financial expenses to rose production and non-subject merchandise based on the ratio of cultivated area to flower type.

Constructed Value Adjustments

In order to calculate FMV, we made company-specific adjustments as described below:

1. Flores La Fragancia S.A.

For CV to purchase price comparisons, we made circumstance of sale adjustments, where appropriate, for credit expenses.

For CV to ESP comparisons, we deducted the indirect selling expenses up to the amount of the indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56 (b)(2).

2. Grupo Andes

For CV to purchase price comparisons, we made circumstance of sale adjustments for direct selling expenses, including credit expenses. We recalculated U.S. credit expenses to reflect data examined at verification.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses, including credit expenses. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2). We recalculated U.S. credit expenses to reflect data examined at verification.

3. Grupo Benilda

For CV to purchase price comparisons, pursuant to section 773(a)(4)(B) of the Act and 19 CFR 353.56(a)(2), we made circumstance of sale adjustments, where appropriate, for credit expenses and other direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses including credit. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

4. Grupo Bojaca

For CV to purchase price comparisons, we made circumstance of sale adjustments, where appropriate, for direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses. We deducted the indirect selling expenses, including, where appropriate, inventory carrying costs, up to the sum of the indirect selling expenses incurred on U.S. sales and commissions to unrelated parties, in accordance with 19 CFR 353.56(b)(2).

5. Caicedo Group

For CV to purchase price comparisons, we made circumstance of sale adjustments, where appropriate, for credit expenses and other direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for credit expenses. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2). We revised reported U.S.-incurred indirect selling expense to include sales to local vendors in the calculation of the indirect selling expense ratio. We recalculated U.S. credit expenses to reflect data examined at verification.

6. Grupo Floramerica

For CV to ESP comparisons, we made deductions, where appropriate, for credit expenses. We also deducted from CV the indirect selling expenses up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

7. Grupo Intercontinental

For CV to purchase price comparisons, we made circumstance of sale adjustments for direct selling expenses, including credit expenses. We recalculated U.S. direct selling expenses to reflect data examined at verification. We also deducted from CV indirect selling expenses, including inventory carrying costs, up to the U.S. unrelated party commissions, and added U.S. commissions.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses, including credit expenses. We recalculated U.S. direct selling expenses to reflect data examined at verification. We also deducted from CV indirect selling expenses, including inventory carrying costs, up to the sum of U.S. unrelated party commissions and indirect selling expenses 19 CFR 353.56(b)(2).

8. Grupo Papagayo

For CV to purchase price comparisons, we made circumstances of sales adjustment for direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses. We also deducted from CV the indirect selling expenses up to the amount of U.S. indirect selling expenses and unrelated party commissions, in accordance with 19 CFR 353.56(b)(2).

9. Grupo Prisma

For CV to purchase price comparisons, we made circumstances of sales adjustment for credit expenses and other direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses. We also deducted from CV the indirect selling expenses up to the amount of U.S. indirect selling expenses and unrelated party commissions, in accordance with 19 CFR 353.56(b)(2).

10. Grupo Sagaro

For CV to purchase price comparisons, we made circumstance of sale adjustments, where appropriate, for credit expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for credit expenses. We also deducted from CV the indirect selling expenses up to the amount of indirect selling expenses and commissions paid to unrelated parties incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

Constructed Value: Companies Without Viable Home Markets and Companies Without Adequate Sales in Any Foreign Market

The Department has determined that, in the case of those respondents for which the home market was not viable, FMV should be based on CV rather than a comparison to third country prices. (For a full discussion of this issue, see Comment 6 of this notice.) These three companies were: Clavecol, Sabana, and Tropicales.

Additionally, for three other respondents, we calculated FMV based directly on CV, in accordance with section 773(e) of the Act, because these respondents did not have adequate sales in either the home market or in any third country markets during the POI. These three companies were: Agrorosas, Mocari, and Rosex.

- *Constructed Value Revisions*

We made specific revisions to each respondents' CV data as described below:

1. Agrorosas S.A.

For Agrorosas, we: (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (2) adjusted G&A to reflect the actual cost of secretarial salaries and to include a portion of the cost of maintaining the office in Bogota.

2. Flores Mocari S.A.

For Mocari, we: (1) Increased pre-production amortization expense to account for an understatement of capitalized costs; (2) adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; and (3) increased financial expense for foreign exchange loss on debt.

3. Grupo Clavecol

For Clavecol, we; (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; and (2) allocated company-wide net financial expense to rose production and nonsubject merchandise based on cost of sales.

4. Grupo Sabana

For Sabana, we; (1) Adjusted amortization and depreciation expenses to account for the effect of Colombian inflation; (2) allocated company-wide net financial expenses to rose production and non-subject merchandise based on the ratio of cultivated area by flower type; and (3) adjusted cull revenue to reflect the amount verified by the sales analyst.

5. Grupo Tropicales

For Tropicales, we adjusted amortization and depreciation expenses to account for the effect of Colombian inflation.

6. Rosex Group

For Rosex, we: (1) Reclassified certain expenses from G&A expense to cost of manufacturing; (2) disallowed interest income earned on investments of working capital not deemed to be short-term; and (3) adjusted amortization and depreciation expenses to account for the effect of Colombian inflation.

- *Constructed Value Adjustments*

In order to calculate FMV, we made company-specific adjustments as described below:

1. Agrorosas S.A.

For CV to purchase price comparisons, we made circumstances of sale adjustments, where appropriate, for direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for

direct selling expenses. We also deducted from CV the indirect selling expenses up to the amount of U.S. indirect selling expenses incurred on U.S. sales and U.S. commissions to unrelated parties.

2. Flores Mocari S.A.

For CV to purchase price comparisons, we made circumstance of sales adjustments for direct selling expenses including credit expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for credit expenses. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

3. Grupo Clavecol

For CV to purchase price comparisons, pursuant to section 773(a)(4)(B) of the Act and 19 CFR 353.56(a)(2), we made circumstance of sale adjustments, where appropriate, for credit expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for credit expenses. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

4. Grupo Sabana

For CV to purchase price comparisons, we made circumstance of sales adjustments for direct selling expenses, including credit expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses, including credit expenses. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

5. Grupo Tropicales

For CV to purchase price comparisons, we made circumstance of sales adjustments, where appropriate, for direct selling expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses, including credit expenses. We also deducted from CV the indirect selling expenses, including inventory carrying costs, up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

6. Rosex LTDA

For CV to purchase price comparisons, we made circumstance of sale adjustments, where appropriate, for credit expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for credit expenses. We also deducted from CV the indirect selling expenses up to the amount of indirect selling expenses and commissions paid to unrelated parties incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

Verification

As provided in section 776(b) of the Act, we conducted verification of the information provided by the respondents by using standard verification procedures, including the examination of relevant sales, cost and financial records, and selection of original source of original source documentation.

Critical Circumstances

In the petition, the petitioner alleged that ''critical circumstances'' exist with respect to importation of roses. However, we did not initiate a critical circumstances investigation because, since roses are extremely perishable, it is not possible to accumulate an inventory of roses in order to evade a potential antidumping duty order. Therefore, we determined that an allegation that critical circumstances exist is without merit (*See* the September 12, 1994, concurrence memorandum).

General Comments

Petitioner and respondents raised comments pertaining to the concordance, the treatment of Difmer adjustments, the aggregation of third country markets, and annual and monthly averaging of FMV. These comments were rendered moot by the Department's decision to base FMV on CV. *See* Comment 6 below.

Comments Pertaining to Scope

Comment 1: Roses in Bouquets

Respondents assert that roses in bouquets should not be included within the scope of the investigation for four reasons: (1) There is no legal basis for the Department to include within the scope of the investigation only a component part contained in imported finished merchandise (*i.e.*, the roses within the bouquet); (2) bouquets are not within the same class or kind of merchandise as roses according to the criteria set out in *Diversified Products* v. *United States,* 572 F. Supp. 883, 889 (CIT 1983)(*Diversified Products*); (3) the Department lacks the authority to expand the investigation to include bouquets; and (4) petitioner does not represent producers of bouquets or producers of ''roses in bouquets.'' Respondents have supplied an analysis of the information in these investigations as applied to *Diversified Products.*

Petitioner requests that the Department continue to include roses in bouquets within the scope of its investigation. Petitioner states that since the description of bouquets is found in the petition, the Department's and ITC's preliminary determinations are dispositive as to the scope of the investigation, and an analysis under *Diversified Products* is unnecessary, although petitioner supplied such an analysis. Petitioner states that the scope description in the petition covers all fresh cut roses, whether imported as individual blooms (stems) or in bouquets or bunches. Also, petitioner claims to represent growers producing mixed bouquets of fresh cut flowers, and hence has standing to file a petition covering bouquets.

Petitioner maintains that any antidumping duty order issued in this investigation will be substantially undermined if foreign rose producers/exporters can circumvent the order by importing bouquets of fresh cut roses covered by the order. Petitioner states that it would be absurd for the Department to permit respondents to combine merchandise subject to the order to achieve a final product outside the scope of the order.

DOC Position

Roses, including roses in bouquets, are within the scope of the investigation and constitute a single class or kind of merchandise. Because the scope covers only the roses in bouquets, not the bouquets themselves, respondents' arguments that bouquets constitute a separate class or kind are inapposite. Therefore, a *Diversified Products* analysis is not required. The Department's conclusion that all roses, whether or not imported as individual stems or in bouquets or bunches, constitute a single class or kind of merchandise is consistent with its determination in *Flowers. See Flowers,* 59 FR 15159, 15162–4 (March 31, 1994) (final results of 4th admin. review).

The packaging and presentation of roses in bunches and bouquets do not transform the roses into merchandise outside the scope of the order. *See Final Determination of Sales at Less Than Fair Value; Red Raspberries from Canada,* 50 FR 19768, 19771 (May 10, 1985). Nor is the rose transformed into a new article by virtue of being bunched or placed in a bouquet. Notably, Customs disaggregates bouquets, requiring separate reporting and

collection of duties on individual flower stems regardless of how they are imported. As a result, Customs, in this case, will collect duty deposits only on individual rose stems incorporated in bouquets, not the bouquets themselves.

Respondents argue that there is no legal basis for the Department to include within the scope of an investigation only a component part of imported finished merchandise, *i.e.*, the roses within the bouquet. As discussed above, consistent with Customs, the Department is not treating bouquets as a distinct finished product.

Respondents' argument that the Department cannot expand the investigation to include bouquets, also can be dismissed. A review of the descriptions contained in the petition and the Department's and ITC preliminary determinations reveals quite clearly that what is covered by this investigation is all fresh cut roses, regardless of the form in which they were imported. Specifically, the petition covers ''all fresh cut roses, whether imported as individual blooms (stems) or in bouquets or bunches, as provided in HTSUS 0603.10.60.'' Petition at 8 (emphasis added). HTSUS 0603.10.60 covers

> Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh * * *
>
> 0603.10.60 Roses:
> 10 Sweetheart
> 90 Other

Furthermore, the scope of this investigation unequivocally states that

> The products covered by this investigation are fresh cut roses, including sweethearts or miniatures, intermediates, and hybrid teas, *whether imported as individual blooms (stems) or in bouquets or bunches.*

Preliminary Determination of Sales at Less Than Fair Value, 59 FR 48285 (Colombia), 59 FR 48294 (Ecuador) (emphasis added). Finally, in its preliminary determination, the ITC found that ''the plain language of Commerce's scope description in these investigations demonstrates that the merchandise subject to investigation covers the roses *in* the bouquets only,'' and not the bouquets themselves. ITC Pub. No. 2766 at 9 (March 1994). Neither the Department nor the petitioner has ever attempted to include the bouquets themselves, nor any of the other types of flowers which comprise a bouquet, within the scope of this investigation. The plain language of the Department's scope description demonstrates that the merchandise subject to investigation covers the roses *in* the bouquets only and does not expressly state that the bouquets are themselves covered. Notably, the ITC stated that ''[b]ouquets are referred to in the scope definition to indicate that all fresh cut roses are covered, regardless of the form, or packaging, they are imported in.'' ITC Pub. No. 2766 at 9 (March 1994).

Finally, we disagree with respondents' contention that petitioner lacks standing in this investigation because it does not represent producers of bouquets or producers or ''roses in bouquets.'' In order to have standing in an antidumping investigation, petitioner must produce, or represent producers of, the like product. *See, e.g., Final Determination of Sales at Less Than Fair Value: Nepheline Syenite from Canada,* 57 FR 9237 (March 17, 1992)(comment 5). We agree with the ITC that there is one like product in this investigation—''all fresh cut roses, regardless of variety, or whether included in bouquets.'' ITC Pub. No. 2766 at 9, 14 (March 1994). Because petitioner represents producers of fresh cut roses they have standing in this investigation.

Comment 2: Spray Roses

Respondent HOSA, an exporter/purchaser of spray roses, argues that spray roses are a genetically distinct species of the *rosa genus.* Therefore, HOSA argues that the Department should exclude spray roses from the scope of the investigation. HOSA states that spray roses are not explicitly included in the scope of the investigation. Furthermore, HOSA argues that spray roses were never mentioned in the petition nor were price or cost of production data provided in the petition for spray roses. HOSA suggests that the Department analyze spray roses pursuant to the criteria set out in *Diversified Products* analysis to evaluate whether spray roses are within the scope of this investigation.

Petitioner requests that the Department include spray roses in the antidumping duty order. Petitioner states that since the description of spray roses is found in the petition, the instant investigation and the Department and ITC determinations are dispositive as to the scope of the investigation and analysis under *Diversified Products* is unnecessary, (although respondent provides an analysis under *Diversified Products*). Petitioner asserts that all fresh cut roses, without regard to stem length, species or variety, were specifically covered in the scope of the petition. Petitioner contends that the fact that spray roses may be of a distinct species of the *rosaceae* family does not exclude them from the petition, since the petition includes all roses, regardless of species. Although it claims it as unnecessary, petitioner conducts an analysis under the *Diversified Products* criteria to show that spray roses are properly included in the scope of the petition.

DOC Position

We agree with petitioner. The descriptions of the merchandise in the petition and in the Department's scope are dispositive with respect to spray roses and the evidence on the record, including the ITC's preliminary determination, supports treating this rose variety no differently than other varieties within the same class or kind of merchandise subject to these investigations.

The scope of the petition clearly refers to spray roses. First, the petition notes that the scope ''* * * covers all fresh cut roses, whether imported as individual blooms, stems or in bouquets or bunches.'' Spray roses are fresh cut roses sold in bunches or bouquets and are classified under the HTSUS subheading 0603.10.60, as are standard roses. Second, the petition states that its scope is ''* * * inclusive of all imported roses from Colombia and Ecuador, without regard to stem length, species or varieties.'' Third, the scope description in the petition cites the ITC's definition from the prior roses investigation. *See* ITC's Publication 2178 at 4–15 (April 1989) ''Roses are members of the *rosaceae* family * * *'' Genetically, spray roses are members of the *rosaceae* family, as are standard roses.

While differences exist between spray and standard roses, it should be noted that differences also exist between other varieties of roses within the scope of this investigation. The ITC stated in its preliminary finding of fresh cut roses from Colombia and Ecuador that ''* * * we note that different rose varieties also have varying stem lengths and bloom sizes (*e.g.*, as with spray roses, sweetheart roses have smaller buds and shorter stems than traditional roses), which we do not find to be significant differences in physical characteristics.'' *See* ITC Pub. No. 2766 at 10 (March 1994). Although the ITC's preliminary finding is not dispositive with respect to this scope analysis, it clearly demonstrates that the physical differences of each rose variety within the same like product category are not merely unique to spray roses, and that the differences of the varieties within the same like product category are not sufficient ''to rise to the level'' of differences in the like product.

We also note that the rationale used by the ITC in these investigations, of including spray roses within the same like product category, is consistent with the Department's rationale as to whether a product should or should not be in the same class or kind of merchandise. In its notice of final determination of sales at LTFV in *Antifriction Bearings from West Germany*, 54 FR 18992 (May 3, 1989), the Department stated that ''the real question is whether the difference is so material as to alter the essential nature of the product, and therefore, rise to the level of class or kind differences.'' The class or kind of merchandise subject to these investigations includes different rose varieties such as sweethearts or miniatures, intermediates, and hybrid teas. Like spray roses, each variety within the class or kind differs from the other varieties. However, in this instance, the similarities greatly outweigh the dissimilarities and the dissimilarities do not alter the essential nature (*i.e.*, that spray roses are export quality roses) of the spray roses.

Comment 3: Rose Petals

Simpson & Turner, an importer of rose heads, rose petals (petals), and foliage (by-products) argues that such products should be excluded from the scope of this investigation because these products are not the same ''class or kind of merchandise'' as the subject merchandise. Simpson & Turner maintains that the petition refers to stems, but does not mention petals or foliage, and the HTSUS description refers to flower buds as ''flower buds of a kind suitable for bouquets or for ornamental purposes.''

Simpson & Turner argues that rose heads, rose petals and foliage were not mentioned in the Department's LTFV investigation's initiation or preliminary determination. The scope description specifically refers to a fresh cut rose as a bloom, which is clarified to be a stem. The scope description then defines the form of importation of the stem as an individual, part of a bouquet or bunch.

Petitioner asserts that Simpson & Turner fails to distinguish imported ''rose bush foliage, rose petals, and rose heads'' from ''culls'' within the scope of the this investigation. Petitioner asserts that culls are within the scope of the petition and investigation. Petitioner states that in its preliminary determination, the Department found that culls are a ''such or similar category'' separate from export quality roses but nonetheless covered by the petition and states further that no party has challenged the Department's determination that culls are within the scope of the investigation.

Petitioner states that the description of merchandise provided by Simpson & Turner, however, invites the Department to issue a scope ruling that would permit culls to enter the United States outside the order. To the extent that Simpson & Turner seek to exclude more than loose rose petals, loose rose foliage, or stems without rose heads, the described merchandise apparently consists of culls, which as such are included by the plain language of the petition and by the Department's unchallenged ruling concerning ''such or similar'' categories.

Petitioner further notes that culls are simply roses that did not meet the criteria of quality and length required for export. Culls may ''have crooked stems, deformed buds, or have opened prematurely.'' (Guaisa § A Resp. at 26). Consequently, petitioner asserts that the roses imported by Simpson & Turner, consisting of rose heads with very small stems or of roses ''normally discarded at the farm level in time of grading due to poor appearance, stage of development and scarring'' meet the definition of culls and should thus be included within the scope of these investigations.

DOC Position

We agree with Simpson & Turner. *See Scope of Investigation* above, indicating that loose rose foliage (greens), loose rose petals and detached buds should be excluded from the scope of these investigations.

The scope used in the preliminary determination clearly stated that roses which are imported as individual blooms (stems) or in bouquets or bunches are included. However, we asked petitioner to comment on this scope issue at the December 12, 1994, Colombia hearing, at which time petitioner clearly stated that it does not consider loose rose foliage, loose rose petals or buds detached from the stem to be included in the scope of these investigations.

Comments Pertaining to USP

Comment 4: Annual and Monthly U.S. Price Averaging

Petitioner argues that USP should not be averaged over a full month or over a year because such prices would be unrepresentative of transaction-specific, daily or weekly U.S. sales. Petitioner claims that both monthly and annual averaging would obscure or mask dumping. Petitioner contends that monthly averaging would mask dumping of roses at low prices within every month and that annual averaging would be even more distortive, concealing dumping during months in which major holidays occur.

Petitioner claims that the facts in the instant *Roses* investigations do not support the reasons articulated in the *Flowers* administrative reviews for departing from the normal Department practice of using daily U.S. prices. Specifically, petitioner maintains that, because roses have a shorter life span than other fresh cut flowers, there is no basis for using a monthly average U.S. price. Petitioner also asserts that respondents' inability to control production, timing, or prices is irrelevant to the application of the averaging provision in the statute.

Respondents claim that the Department erred in the preliminary determination by comparing one average constructed value encompassing all varieties and stem lengths to a product-specific monthly average USP. Respondents argue that this comparison is inappropriate because, although growers do not maintain cost records on a variety-specific or stem-specific basis, different rose products have different physical characteristics and different costs and values related to productivity and consumer preferences, all of which result in widely different prices. Respondents assert that if costs are standardized, yet prices fluctuate according to consumer demand for particular rose products, average costs can only be meaningfully compared to equivalent average prices without artificially creating margins. Respondents argue that an annual average constructed value should be compared to an annual average USP. Respondents state that the unique factors characterizing rose production, demand, and perishability, in addition to extreme seasonality, compel the use of annual average U.S. prices.

Respondents maintain that using any type of monthly average USP in the comparison measures only seasonality and not dumping. Specifically, respondents argue that the Department must take into account: (1) That the USP cycle is an unavoidable consequence of the highly seasonal nature of U.S. demand; (2) the high perishability of the product; (3) the rose production cycle is geared towards consumer demand which is concentrated around Valentine's Day; and (4) roses cannot be stored and rose production is a continuous process that cannot be turned off after Valentine's Day. According to respondents, these conditions result in unavoidable price swings. For these reasons, respondents contend that using any type of monthly USP average artificially creates dumping

margins by establishing a benchmark that no producer can meet.

In addition, respondents contend that using monthly average USP does not account for month-to-month volatility caused by the extreme seasonality of U.S. demand. Therefore, respondents maintain that monthly average U.S. prices are not representative for purposes of comparison with an annual CV and that only an annual average USP captures the full demand/production cycle, undistorted by seasonal factors.

Regarding petitioner's contention that the Department should not use a monthly USP in the *Roses* cases because, unlike flowers, roses have a shorter life, Floramerica points out that shelf life alone does not justify a departure from the Department's traditional averaging methodology and further, that there is information on the record which shows that roses do not have a shorter shelf life.

DOC Position

19 U.S.C. 1677f–1(b) and 19 353.59(b) provide the Department with the discretionary authority to use sampling or averaging in determining United States price, provided that the average is representative of the transactions under investigation. In these investigations, we determined, based on a combination of factors, to average U.S. sales. The Department was confronted with approximately 555,000 Colombian transactions which, when combined with the number of estimated U.S. sales transactions from Ecuador, exceeded one million. As a result, a decision to make fair value comparisons on a transaction-specific basis would place an onerous, perhaps even an impossible, burden on the Department in terms of data collection, verification, and analysis. Consequently, we exercised our discretion in order to reduce the administrative burden and maximize efficient use of our limited resources. Additionally, we recognize the need for consistency in our treatment of these concurrent investigations and, although the number of transactions may vary between the two countries, uniform application of an averaging methodology ensures that both Colombia and Ecuador will be treated on the same basis. *See* the June 24, 1994, Decision Memorandum pertaining to reporting requirements from Team to Barbara Stafford.

Moreover, we took into account that the majority of respondents, who make U.S. sales on consignment, have little, if any, ability to provide the level of detail which would have been required for the Department to do a transaction-specific analysis because unrelated consignees generally keep accounts for respondents' U.S. sales in monthly grower reports. Upon review of data submitted, and later verified, we concluded that a month was the shortest period of time which would permit all respondents to provide U.S. sales information on a uniform basis, thus ensuring that we treated all respondents in a similar manner in terms of data collection and analysis.

Importantly, because of the highly perishable nature of the product, we believe that monthly averaging of U.S. prices in these investigations provides a fair and more representative measure of value. Unlike nonperishable merchandise, respondent growers cannot withhold their roses from the market to await a better price. Rather, respondents are faced with the choice of accepting whatever return they can obtain on certain sales, so-called ''end-of-the-day'' and ''distress sales'', or of destroying the product. Were we to perform a transaction-by-transaction comparison, such an approach, beyond the limits imposed on the Department as described above, would give undue and disproportionate weight to end-of-the-day sales. Even where a respondent's normal sales were above fair value, he could be found to be dumping solely on the basis of sales made as a result of perishability. By adopting a monthly averaging period, we ensure that the entire range of distress and nondistress sale prices are covered.

Furthermore, while use of actual prices and transaction-by-transaction data is the norm, the statute allows for averaging provided such averaging yields representative results. We conclude that, in light of the above factors, using monthly averages of U.S. sales prices constitutes the shortest period necessary to capture a representative analysis of the ordinary trading practices in this industry. Our approach is consistent with the Department's past practice in investigations of fresh cut flowers as well as other perishable agricultural products. See Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review, 55 FR 20491 (May 17, 1990); Final Determination of Sales at Less Than Fair Value: Certain Fresh Cut Flowers From Mexico, 52 FR 6361 (March 3, 1987). Furthermore, our approach has been upheld consistently by the court. See *Floral Trade Council* v. *United States*, 775 F. Supp. 1492, 1500–2 (CIT 1991); *Asociacion Colombiana de Exportadores de Flores* v. *United States*, 704 F. Supp. 1114 (CIT 1989).

Lastly, we are unpersuaded by two additional arguments proffered by petitioner to shorten the averaging period in these investigations. First, petitioner claims a factual distinction between the life-span of a rose and a fresh cut flower. However, we find that the record in these investigations establishes that from the time of importation, roses last approximately seven to ten days, while flowers last approximately ten to fourteen days and both may be held for more than one week in refrigerated coolers. Thus, we find this to be a distinction without a difference. Second, petitioner argues that, by not using a shorter averaging period, dumping during peak holiday periods such as at Valentine's Day, will elude the Department. According to petitioner, sales of roses imported before this holiday, but which are sold after the holiday when demand is quite low, will be sales at dumped prices. The petitioner does not consider such dumped sales legitimately within the category of end-of-the-day sales, for which our averaging period is designed to fairly account. Rather, petitioner argues that by averaging these low-priced sales with high-priced holiday sales for the month of February, dumping will be understated. While we recognize that using a monthly averaging period could result in some offsetting of high-priced sales with low-priced sales, we believe that overall, monthly averaging is representative of the transactions under investigation. Moreover, in verifying numerous companies' February grower reports we found that only an insignificant number of roses were imported in February after Valentine's Day, as compared to the overwhelming volume imported during the first 13 days of the month, thus ameliorating this circumstance.

Annual Averaging

While we recognize that averaging is necessary in these investigations, we believe that averaging U.S. sales prices over a year is inappropriate. As we stated in *Flowers*,

> nothing in the statute, the legislative history, or the Department's practice (including *Final Determination of Sales of Not Less Than Fair Value: Fresh Winter Vegetables from Mexico* (45 FR 20512; March 24, 1980) supports the broad notion of annual averaged U.S. prices. Annual averaging would extend too much credit to respondents by allowing them to dump for entire months when demand is sluggish, so long as they recoup their losses during months of high demand.

See Final Results of Antidumping Administrative Review and Revocation in Part of the Antidumping Duty Order: Certain Fresh Cut Flowers from

Colombia, 56 FR 50554, 50556 (October 7, 1991). The CIT has agreed with the Department that monthly averaging adequately compensates for perishablilty but averaging over a longer period could obscure dumping. See *Floral Trade Council* v. *United States*, 775 F. Supp. 1492, 1500 (CIT 1991).

Even though respondents argue that the demands of the U.S. market determine their U.S. pricing and that they are price takers rather than price setters, we note that the intent to dump is not the issue. See Final Determination of Sales at Less Than Fair Value: Certain Fresh Cut Flowers from Mexico, 52 FR 6361, 6364 (March 3, 1987). The issue is whether, in fact, dumping is occurring.

Comment 5: Product Averaging

Regarding the use of variety and stem-specific monthly average USPs, respondents contend that the Department is bound by its longstanding administrative practice in the original investigations and subsequent administrative reviews of *Flowers* to calculate monthly average USPs by flower type, without regard to variety or grade. Additionally, the Department has consistently concluded that comparing CV data by flower type to grade or variety-specific USPs would produce unfair and distorted results. Respondents maintain that the Department has not furnished any reasonable explanation for its departure from this practice in the preliminary determination.

Respondents urge the Department to compare all rose products to all rose products on an annual average basis. Alternately, respondents request that the Department compare product-specific, monthly U.S. prices to identical product-specific, monthly FMV prices. Respondents note that where FMV is not available, CV should be used. However, the profit element should be monthly FMV profit, not annual FMV profit. In addition, respondents argue that average CV of all products combined must be compared to U.S. prices of non-matched products.

Petitioner argues that product averaging should not be used to obliterate differences in prices due to physical differences in roses. Petitioner stresses that it is particularly important that the prices of the low-priced Visa roses are not averaged together with prices of other red roses. Petitioner maintains that an average across varieties, colors, or stem lengths substantially distorts the market reality.

DOC Position

We agree with respondents that averaging by flower type is appropriate in this investigation. Consistent with *Flowers*, where possible, we compared USP and CV on a rose type basis, *i.e.*, hybrid tea, sweetheart, etc. *See, e.g., Fresh Cut Flowers From Colombia*, 59 FR 15159, 15160–61 (March 31, 1994) (4th admin. review final). For a number of companies, however, we were unable to compare USP and CV on a rose type basis because the respondents do not keep their cost data in such a fashion. As a result, in order to ensure an ''apples-to-apples'' comparison, we aggregated U.S. price data to arrive at a weighted-average monthly USP for all rose types for comparison with respondents' single average CV for all rose types. While it would have been preferable to disaggregate rose costs for these respondents in order to make a fair value comparison on a rose type basis, we were not able to do so in this investigation because the data were not available and we did not present respondents with a methodology for disaggregating costs. However, we intend to do so in any future administrative reviews if an order is issued. We will seek to devise a method to enable us to compute cost by rose type, which will not require respondents to change their method of recordkeeping.

Comments Pertaining to Third Country

Comment 6: Third Country as Basis for FMV

Petitioner maintains that there is no basis in law for rejecting third country prices that are adequate to establish a viable market. In addition, petitioner states that the Department's regulations state a preference for the use of third country prices, where the home market is not viable. Petitioner maintains that the statute prescribes adjustments for differences in circumstances of sale, which can take account of differences in markets, but it does not permit the Department to simply reject a viable market, due to factors other than dissimilar merchandise, for the purposes of determining FMV.

Petitioner claims that there is no evidence on the record to establish that third country prices are incompatible for comparison to U.S. prices. Petitioner questions the validity of respondents' statistical studies, claiming that the statistical analyses provided by Drs. Botero and Sykes and Lewis are unworthy of consideration because they exclude the impact of dumping in their price analyses. According to petitioner, if the Colombian and Ecuadoran growers are dumping during the several off-peak (non-holiday) months in the U.S. market, but not in other markets, such dumping would produce price changes in the U.S. market that are much sharper and greater than the price changes in Europe, thereby causing the greater volatility in the U.S. market identified by respondents. Petitioner adds that, because the Colombian and Ecuadoran imports constitute such a large percentage of the U.S. market and because they sell through consignment agents on a national basis, the supply of Colombian and Ecuadorian roses uniformly depresses U.S. prices whenever those imports oversupply the U.S. market.

Petitioner argues that the Botero and Sykes and Lewis reports are further skewed because they use the prices of a single variety of red rose, the Visa, which it asserts is the most price sensitive. Moreover, these reports did not provide source documentation showing the composition of the Dutch auction prices relied upon. Thus, it is unclear how many varieties of roses were included in the comparison database. In addition, since Colombian and Ecuadoran roses sold on the Aalsmeer auction account for only a very small portion of all roses exported to the EU, Aalsmeer prices may not be representative of Colombian and Ecuadoran rose prices in the EU.

Petitioner argues that the statements provided in the Hortimarc Report based on FTD data, which included traditional retail florists and excluded non-traditional outlets such as supermarkets, and mass merchandisers, ignores a significant number of spontaneous purchases from their analysis.

Petitioner states that the Stern & Wechsler argument regarding the opposing demand strains of the U.S. and EU market are irrelevant to the comparison of foreign market values and U.S. prices. Petitioner maintains that the U.S. market is as supply driven as any other market during non-holiday months.

Petitioner recognizes that in the second administrative review of *Fresh Cut Flowers From Colombia*, (55 FR 20491, May 17, 1990) (*Flowers*), the Department departed from its normal practice and rejected third country prices in favor of CV for the following three reasons: (1) Third country and U.S. price and volume movements were not positively correlated which showed that different forces operated in the relevant markets, in some instances, pushing prices in opposite directions; (2) third country sales only occurred in peak months which resulted in a distorted comparison of off-peak U.S.

prices to peak third country prices; and (3) the perishable nature of flowers and the inability to control short-term production resulted in ''chance'' sales.

Petitioner argues that the Department's analysis of statistical data on the record in these investigations confirmed a positive correlation in prices, thus refuting the principal finding of the *Flowers* case. In fact, petitioner argues that the basis for creating an exception to the statutory preference for price-to-price comparisons was the presence of a negative correlation. Regarding volatility, petitioner notes that in *Flowers*, the Department never required that prices be equally volatile in each market; volatility alone does not require the Department to reject a price-to-price comparison. In fact, petitioner argues that in *Flowers* the Department found differences in volatility between the U.S. and European markets and price movement in opposite directions in each market.

Regarding the second factor, petitioner observes that, unlike the *Flowers* case, third country sales of roses even occur in off-peak months and argues that the Department's six-month weighted average FMVs take into account seasonal peaks and off-peaks. Moreover, petitioner maintains that major flower buying holidays are the same in all markets and, therefore, peaks will occur at similar times in all markets.

Finally, with regard to the issue of perishability and production control, petitioner maintains that respondents may control production by pinching back rose buds. In addition, petitioner notes that there is evidence on the record indicating that third country sales of roses are stable, some occurring as a result of negotiated standing orders and, therefore, there is a lesser incidence of chance sales than was present in *Flowers*. Petitioner contends that statements by respondents regarding a potential shift of exports from third country markets to U.S. markets reveals the extent to which respondents, in fact, control, plan, and target their rose exports to certain markets.

Respondents claim that third country prices should be rejected in favor of CV because the three factors found in *Flowers* are present in these cases. With regard to the first *Flowers* factor, respondents quote empirical evidence on the record showing substantial differences in demand and pricing seasonality between U.S. and third country markets. Respondents argue that there are two principal aspects of seasonality: timing (*i.e.*, the point in time at which demand peaks and valleys occur in seasonal cycles) and volatility (*i.e.*, the magnitude of peaks and valleys). Respondents argue that, in *Flowers*, the Department relied on both differences in timing and in volatility to explain why it rejected third country prices. Respondents assert that in the rose industry, as in the flower industry: (1) The U.S. market is holiday-demand driven; (2) U.S. demand is not a stable consumption base because the majority of roses are purchased primarily as gifts; and (3) the U.S. market is demand driven. In contrast, respondents state that: (1) The European market is marked by relatively even year-round demand; (2) flower purchasing on a more regular basis (not tied to gift giving) is a deep rooted tradition in Europe; and (3) the European market is supply driven.

Respondents have submitted several statistical analyses of the different markets which, they claim, conclusively show that the seasonal demand and pricing patterns are significantly different between the markets. Respondents point to the second Botero report and the Sykes & Lewis report which states that the mere presence of a price correlation is insufficient proof that demand patterns are equivalent. Respondents contend that while petitioner criticizes their statistical analysis, petitioner has not provided any independent correlation analysis regarding U.S. and third country prices.

With regard to the second *Flowers* factor, access to third country markets, respondents claim that petitioner's own data rebut the contention that respondents have substantial continuous access to third country markets because there are no Colombian and Ecuadorian imports of roses in at least one month for every country for which petitioner has provided data. Respondents assert that petitioner's claim that Colombian and Ecuadorian production is planned with third countries in mind, and that roses are sold at the same fixed price over a period of time as a result of a pre-negotiated arrangement, is a misunderstanding of the facts on the record.

In addition, respondents claim that combining third country markets would not rectify the gaps created by the absence of sales in all months in individual markets. Respondents note that adding two markets with partial year sales is still tantamount to using only peak prices for foreign market value.

With regard to the third *Flowers* factor, respondents claim the control and perishability factor relied upon by the Department in the *Flowers* case is equally applicable to roses. Respondents cite to portions of the Department's *Roses* preliminary determination where the Department noted that there are substantial similarities between flowers and roses in perishability and short-term lack of production control. Respondents also cite to the first Tayama report which states that roses are even more perishable than fresh cut flowers.

Respondents claim that petitioner oversimplifies their argument regarding seasonality by neglecting to view all aspects of the *Flowers* exception: the unique combination of differences in seasonality between U.S. and third country markets for a highly perishable product for which production cannot be controlled in the short term. Thus, respondents maintain that the *Roses* case is a logical extension of the *Flowers* case.

DOC Position

The Department agrees with respondents. In the preliminary determination, we rejected respondents' request to use CV as the basis for FMV because we determined that the record at that time did not support the application of the *Flowers*' precedent. Since the preliminary determination, a considerable amount of new information has been submitted. Based on our review of this new information, we have determined that the records in these cases warrant rejection of third country sales in favor of CV. *See* the January 26, 1995, Decision Memorandum pertaining to third country versus constructed value from the Team to Barbara Stafford for a more detailed discussion of this issue.

Information on the record establishes that the three factors identified by the Department in *Flowers* as supporting the use of CV are satisfied in this case. First, the market for roses in the U.S. differs significantly from the markets in third countries. For example, as in *Flowers*, price and quantity within the United States' rose market are positively correlated; however, the price and quantity within Europe, Canada, and Argentina are negatively correlated.

Similarly, the U.S. market for roses, like the U.S. market for flowers, is more volatile in terms of price and quantity movements than the markets in third countries markets; the European per capita consumption of flowers is four to ten times greater than the United States, and Colombian and Ecuadorian producers have, in general, limited access to the main third country markets, *i.e.*, the Dutch auction. Thus, the differences in the rose markets are

similar to the differences that existed in *Flowers.*

The second *Flowers* factor we considered was whether a comparison of third country sales to U.S. sales would require comparisons of low-price U.S. sales in off-peak months with high-price third country sales in peak months, or vice versa. In the preliminary determination, we found that this factor was not present in these investigations because: (1) There were sufficient third country sales in each month of the POI (when markets were combined); and, (2) using two six-month FMV periods reduced distortion caused by price comparisons involving peak and non-peak periods.

For purposes of this final determination, we have determined that use of third country prices could result in off-peak U.S. sales being compared with peak third country sales. While six- month averages ameliorate potential distortions, almost all of the respondents do not have third country sales in every month of the POI. It is only by combining markets that respondents have sales in each month of the POI. If we were to use third country prices as the basis for FMV, prices during peak periods in one third country could be combined with prices during peak periods in another third country. These peak prices would then be compared to both peak and non-peak periods in the United States. We find that this factor supports use of CV in these cases, albeit to a somewhat lesser degree than in *Flowers.*

The third *Flowers* factor we considered was the extreme perishability of roses—*i.e.,* the inability to control short-term production—and the resultant ''chance'' element to sales. As noted in our preliminary determinations, there are substantial similarities between the subject merchandise in these investigations and *Flowers:* (1) Roses, like flowers, are extremely perishable; (2) rose growers have relatively minor control over short-term production; (3) rose production is also affected by exogenous factors (*e.g.,* weather, disease, etc.) like other flowers; and 4) roses cannot be stored and we note that there are only very minor alternative uses (*e.g.,* drying).

In conclusion, we have determined that the factors that led the Department use CV instead of third country prices in Flowers are present in these investigations. Therefore, we have adopted CV as the basis for comparison with U.S. prices.

Comments Pertaining to Related Party Commissions

Comment 7: Related Party Commissions

Petitioner requests that commissions paid to consignment agents should be deducted from USP even where consignees are related parties. Specifically, petitioners argue that: (1) The statute directs us to deduct commissions from USP in ESP situations, without discretion to disregard U.S. commissions in related party transactions; (2) in *Timken,* the court recognized that the statute required a deduction when a U.S. importer was paid commissions, as opposed to earning ''profits;'' (3) the statute should be followed, regardless of the fact that commissions were not deducted in *Flowers*; and (4) we should deduct U.S. indirect selling expenses if such expenses exceed the related consignee's commissions, in accordance with 19 U.S.C. 1677a(e)(2).

Respondents claim that the Department's treatment in the preliminary determination of related party sales commissions is invalid. They argue that deducting the related importer's commission from U.S. price has the effect of deducting the importer's profit, which the Department does not have the authority to do. The Department should deduct the importer's actual selling expenses rather than intra company transfers. Respondent's argue that the Department's approach is inconsistent with past practice since related party commissions have never been treated as a direct selling expense, but rather have been collapsed in the past for the purposes of determining U.S. price and expenses. Moreover, respondents assert that the Department's statute and regulations do not authorize the Department to deduct the higher of related party commissions or related party actual expenses. Respondents claim that in selectively choosing deductions of commissions or actual expenses, the Department fails to account for the fact that the commission it treats as a cost is also sales related income to the related importer. Respondents maintain that the Department should ignore the sales commissions paid between related parties on ESP sales, regardless of whether such commissions are at arm's length, and treat as U.S. indirect selling expenses the importer's share of operating and selling expenses allocable to the exporter's subject sales.

DOC Position

The difference between a related consignee's commission and the related consignee's U.S. indirect selling expenses is equal to the related consignee's profit. The Department does not deduct profit from USP in ESP transactions because the law does not allow it. 19 CFR 353.41(e)(1) and (2) do, however, instruct us to make adjustments in ESP situations for commissions and expenses generally incurred by or for the account of the exporter in selling the merchandise.

With respect to treatment of related party commissions paid in the U.S., we have in the past looked to the definition of ''exporter'' which provides that related party importers are to be collapsed with, and treated as part of, the exporter. 19 U.S.C. 1677(13). In this context, it is inappropriate to treat a commission the exporter has paid to itself as an expense. The expense is the actual costs incurred by or for the account of the exporter.

In *LMI-Le Metalli Industriale, S.p.A.* v. *United States,* 912 F.2d 455, 459 (Fed. Cir. 1990) (*LMI*), the CAFC indicated that related party commissions can and should be adjusted for if the commissions are at arm's-length and are directly related to the sales under review.[1] By implication, an arm's-length commission includes the actual indirect selling expenses incurred by the commissionnaire and the commissionnaire's profits. Thus, *LMI* allows us to deduct the profits that are implicit in the commission. The facts in *LMI,* however, are distinguishable from the facts in these investigations. In *LMI,* the Court directed the Department to adjust for sales commissions paid to a related subsidiary of the respondent in the home market. The sales on which the commissions were paid in the home market were purchase price-type transactions made with the assistance of the related party selling agent. The issue of how to treat any selling expenses incurred by the related party selling agent in addition to commissions earned by that related party selling agent did not arise in *LMI.*

In the instant investigations, the sales on which the commissions were paid are ESP transactions where, because the importer of the merchandise is related to the exporter, we collapse the two pursuant to 19 U.S.C. 1677(13) and base USP on the sale to the first unrelated party. In contrast to *LMI,* therefore, the

[1] In *Coated Groundwood Paper from Finland,* 56 FR 56363 (November 4, 1991), which was subsequent to *LMI,* we developed guidelines to determine whether commissions paid to related parties, either in the United States or in the foreign market, are at arm's-length. If, based on the guidelines, we found commissions to be at arm's-length, we stated that we would make an adjustment for such commissions.

producer and its related party selling agent in these investigations are collapsed. Thus, the commission represents an intracompany transfer of funds. Under these circumstances, our past practice of ignoring intracompany transfers is still applicable.

Furthermore, ESP transactions are fundamentally different from purchase price transactions in that, with respect to ESP transactions, 19 U.S.C. 1677a(e), specifically allows for deductions of indirect expenses. In contrast, with respect to purchase price transactions, 19 U.S.C. 1677a(d) only allows an adjustment for indirect expenses when there are commissions in one of the two markets. Therefore, when commissions are paid in an ESP situation, the opportunity for double counting exists; this problem does not arise in a purchase price situation like the one reviewed by the Court in *LMI.*

Whether the sales involved are purchase price or ESP, the Department's goal is to derive a reliable USP by subtracting actual expenses from actual sales prices. A commission paid by the exporter to its collapsed related importer is not an expense incurred by the exporter; rather the actual expenses incurred by the exporter are the indirect selling expenses of the related consignee.

At the preliminary determination, we determined that related party commissions were directly related to the sales under consideration. However, we agree with respondents and, for the final determination, considered commissions an intracompany transfer. We have therefore, deducted only the amount of U.S. indirect selling expense for all companies with related party commissions.

Comments Pertaining to Accounting

Comment 8: Inflation Adjusted Depreciation and Amortization

Petitioner argues that the Department should compute respondents' depreciation expense based on asset values which, in accordance with Colombian GAAP, have been adjusted to reflect the effects of inflation. Petitioner notes that respondents computed depreciation charges for rose production costs based on the historical cost of the underlying fixed assets. Petitioner maintains that because of the effects of inflation on prices, respondents' methodology inappropriately matches historical depreciation charges based on past price levels with revenues generated from the sale of roses at current price levels.

Petitioner notes that in past cases involving hyperinflationary economies, the Department has corrected for the effects of inflation by computing cost of production based on respondent's replacement costs. Petitioner argues that although the POI inflation rates in Colombia did not meet the Department's normal hyperinflation threshold, the annual rate of inflation nevertheless has been so substantial as to cause the government to adopt accounting standards that require an adjustment for inflation. Thus, according to petitioner, the Department must correct respondents' reported depreciation expense in order to avoid distorting the cost of rose production.

Respondents claim that the Department should accept their submitted rose production costs without taking into account the effects of the inflation adjustment on depreciation expense. Respondents argue that, although the inflation adjustment may result in additional costs in their financial statements, these are not actual, historical costs. Instead, the inflation adjusted costs are ''phantom'' costs required by tax law, but not specifically addressed under GAAP.

Respondents maintain that the purpose of the tax law was to generate tax revenues for the government, because any write-up of fixed assets due to inflation results in additional income that must be recognized in a firm's financial statements. Respondents contend that if the Department determines that it must include the effects of the fixed asset inflation adjustment in respondents' rose CV, then it also must reduce CV by the amount of financial statement income generated by the adjustment. Respondents note that such income is directly related to production and, thus, there is no basis for failing to offset costs if the inflation adjustment is included in CV.

Additionally, respondents claim that the Department already effectively makes an inflation adjustment through the use of monthly exchange rates in its computer program. Respondents state that the exchange rate is related to differences in the two countries rates of inflation, and the use of such exchange rates has an effect equivalent to making the year-end inflation adjustment.

DOC Position

We agree with petitioner that respondents' failure to follow their normal accounting practice of adjusting depreciation and amortization expenses for the effects of inflation distorts rose production costs for purposes of our antidumping analysis. The exclusion of the inflation adjustment results in costs which are not reflective of current price levels and thus produces an improper matching of revenues and expenses. Therefore, we have revised the submitted COP and CV figures to reflect inflation- adjusted depreciation and amortization expenses based on the growers' normal accounting practices.

We disagree with respondents' claim that the Department's use of monthly exchange rates effectively makes an inflation adjustment, because the exchange rates are being applied to costs which are reported in understated foreign currency. To avoid distortion in production costs, we have used annual average constructed value figures and converted them to U.S. dollars using a weighted-average exchange rate based on the monthly volume of roses sold by each grower.

We also disagree with respondents' assertion that income resulting from the inflation adjustment is directly related to production and should be applied as an offset to financial expense. This annual revaluation of non-monetary assets does not represent income during the POI. Instead, it merely reflects an increase to respondent's financial statement equity due to the restatement of non-monetary assets to account for inflation.

Comment 9: Statutory General Expenses and Profit

Petitioner claims that statutory general expenses and profit should be based on third country sales, since third country sales and third country profit and general expenses would be used as a basis for FMV when home market sales are not available.

Respondents maintain that the facts of this case and the statute require that Department calculate profit on the basis of home market sales, particularly since the Department made a finding in its preliminary determination that home market sales of export quality roses were made in the ordinary course of trade. In addition, respondents note that where the Department used third country price comparisons in its preliminary determination, if in the final determination the Department chooses to reject third country prices in the final determination in favor of CV, it cannot use annual average third country profit margins in calculating CV, because this would be the equivalent of comparing an annual average third country price to a monthly average U.S. price.

DOC Position

In calculating CV, we used selling expenses based on U.S. surrogates and the eight percent statutory minimum for profit where there was not a viable home market for export quality roses.

Where there was a viable, but dissimilar, third country markets, we used U.S. surrogates and the eight percent statutory profit because we have determined that third country markets do not provide an appropriate basis for foreign market value. *See* Comment 6 above.

We used U.S. selling expenses as a surrogate even though certain producers had viable home markets for culls which are included in the general class or kind of merchandise.

19 U.S.C. 1677b(e)(1)(B) states that the CV of imported merchandise shall include an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—

(i) The amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and (ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost.

19 CFR 353.50(a) states that if FMV is based on CV, the Secretary will calculate the FMV by adding general expenses and profit usually reflected in sales of merchandise of the same class or kind of merchandise.

However, in the final determination of *Certain Granite Products from Italy,* 53 FR 27187, 27191–2 (July 19, 1988)(comment 15), the Department stated that, due to the uniqueness of one of the such or similar categories of merchandise, there was no comparability between sales in the home market and sales in the United States. Therefore, the Department used the U.S. selling expenses as a surrogate in computing CV instead of home market selling expenses. As in *Certain Granite Products from Italy,* we find that, in the instant investigations, culls are not representative of the merchandise sold in the United States, as these products are by definition not export-quality.

Comment 10: Allocation of Production Costs to Cull Roses

Respondents argue that the Department incorrectly calculated CV by requiring growers to allocate production costs only to export quality roses, thereby assigning no costs to cull roses. Respondents note that because cull roses are included in the class or kind of merchandise, they should be allocated a share of production costs equal to that of export quality roses. Respondents point out that the Department has never held that a product covered by an investigation should be treated as a byproduct having no cost. Respondents also argue that the Federal Circuit in *Ipsco, Inc.* v. *United States,* 965 F.2d 1056 (Fed. Cir. 1990) defined byproducts as ''secondary products not subject to investigation.''

Petitioner asserts that cull roses should be categorized as byproducts to which, from an accounting standpoint, no production costs should be allocated. Petitioner claims that an appropriate measure for determining whether a specific product represents a byproduct or coproduct is to determine if the production process would still be performed if the product in question was the only one produced. According to petitioner, no rose grower would establish operations solely for the purpose of growing culls for sale and, therefore, cull roses are unmistakably byproducts. Petitioner notes that ITA has consistently and correctly treated cull roses as byproducts, with revenues earned from their sale being properly recognized as other income and, thus, deducted from the cost of producing export quality roses.

DOC Position

We disagree with respondents' claim that CV was calculated incorrectly by not allocating any production costs to cull roses. When determining how to allocate costs among joint products, the Department normally relies upon generally accepted accounting principles (GAAP) to prescribe an appropriate cost allocation methodology. One of the factors used to assess the proper accounting treatment of jointly-produced products examines the value of each specific product relative to the value of all products produced during, or as a result of, the process of manufacturing the main product or products. In this regard, the distinguishing feature of a byproduct is its relatively minor sales value in comparison to that of the major product or products produced.

The Department's general practice in agricultural cases has been to offset the total cost of production with revenue earned from the sale of the reject agricultural products. The cultivation costs, net of any recovery from byproducts, are then allocated over the quantity of non-reject product actually sold. *See, e.g., Fresh Cut Flowers from Colombia,* 52 FR 6844 (March 5, 1987); *Fresh Cut Flowers from Peru,* 52 FR 7003 (March 6, 1987); *Fall-Harvested Round White Potatoes,* 48 FR 51673 (November 10, 1983); *Fresh Cut Roses from Colombia,* 49 FR 30767 (August 1, 1984).

In *Asociacion Colombiana de Exportadores* v. *United States,* 704 F Supp. 1114, 1125–26 (CIT 1989), the Court found that ''[c]ulls were often disposed of as waste, or if saleable, were sold for low prices in the local market. ITA's treatment of non-export quality flowers as a byproduct was supported by substantial evidence. The record indicates that cull value was relatively low and that the production of culls was unavoidable. These both have been recognized by ITA in the past as indicia of byproduct status.'' The CIT further noted, ''[c]ull value, if determinable, should be deducted from cost of production and production costs should not be allocated to culls.''

For each respondent in this investigation, the total revenue generated from the sale of cull roses was minimal when compared to the revenue generated from the sale of export quality roses. Other facts concerning the production and sale of cull roses are also consistent with those found in the investigation and subsequent administrative reviews of *Flowers.* We therefore find that it is appropriate to treat cull roses sold in the home market as a byproduct of the production of export quality roses. This treatment is consistent with the Department's previous practice of accounting for culls as a byproduct in the calculation of COP and CV.

Finally, we disagree with respondents' argument that the inclusion of cull roses in the class or kind of merchandise compels the Department to use a particular cost accounting methodology. A decision that a particular product is, or is not, within the scope of a proceeding does not dictate, or necessarily have any relationship to, the selection of the particular cost accounting methodology that must be applied in the determination of COP and CV.

Unlike respondents, we do not read the Federal Appeals Court's decision in *Ipsco* as standing for the proposition that in all circumstances a byproduct for accounting purposes cannot be within the class or kind of merchandise as that term is defined under the Act. Moreover, as discussed above, our decision in this regard has been explicitly upheld by the CIT.

Comment 11: CV—Interest Expense

Respondents argue that the Department grossly overstated each respondents' net interest expense in calculating CV by using total company-wide interest expense instead of the expense allocable to rose production. Respondents request that the Department correct its preliminary

calculations in line 38 of the CV tables, and using the allocated per unit interest expense calculated on the spreadsheet.

Petitioner agrees with respondents that net interest expenses were potentially overstated in the preliminary determination and ITA should allocate interest expenses on a sales dollar basis to roses and then to rose stems, provided that interest expenses reported were in fact reported with respect to all sales of all rose types to all markets.

DOC Position

We agree that for some respondents we incorrectly assigned total company-wide financial expenses only to roses. For purposes of the final determination, we allocated net financial expenses to roses and non-subject merchandise using one of the following methodologies, each of which we consider reasonable: cultivated area, cost of sales or cost of cultivation. We computed a per stem financial cost by dividing the net financial expenses related to roses by the total export quality of stems sold.

Comment 12: CV—U.S. Indirect Selling Expenses

Respondents allege that the Department incorrectly included U.S. indirect selling expenses incurred by respondents' related importers in its calculation of constructed value. Respondents claim that including these expenses in constructed value artificially inflated the FMV, since these expenses would never have been incurred to sell roses in the home market. In addition, respondents object to the Department's calculation of an eight percent profit on these expenses, while at the same time deducting related party commissions, and thereby all profit earned by the related importer, from U.S. prices. Respondents hold that the Department should include only all selling expenses incurred in Colombia and Ecuador in its calculation of CV.

Petitioner claims that the Department should include in constructed value direct and indirect selling expenses equal to those expenses incurred in third country markets, unless such markets are not viable. And, to the extent that the Department deems home market sales to be within the ordinary course of trade, and in the event that the home market for any given respondent was viable, then the Department should add home market selling expenses to constructed value. Petitioner states that, in the absence of selling expenses from either the home or third country market, the Department's practice is to add U.S. selling expenses in computing SG&A.

DOC Position

For those companies with viable home markets, we used home market indirect selling expenses. For those companies without viable home markets we used U.S. indirect selling expenses as a surrogate. *See* Comment 9 above. Respondents' objection to deduction of related party commissions is addressed in Comment 7 above.

Comment 13: Per Unit CV in Dollars

Respondents argue that the Department's methodology used to obtain the per unit CV in dollars produces a distorted, declining per unit dollar CV. Respondents note that the Department's method involves converting annual average per unit foreign-denominated costs to monthly per unit dollar figures using the monthly exchange rate, which in part reflects a relatively high inflation rate. Respondents claim that in order to properly obtain the average per unit CV, the Department should first convert each month's total foreign-denominated costs using that month's exchange rate, and then sum these monthly dollar costs for the period. Next, the total dollar costs should be divided by the total quantity of roses sold to obtain the average per unit CV in dollars for the period.

Petitioner does not object to respondents' request for modifications in the Department's methodology, although petitioner suggests that such modifications are unnecessary. If modified however, petitioner argues that it is inappropriate to apply a foreign-dominated interest rate in order to calculate imputed credit costs, unless the exchange rate is also adjusted for currency devaluation.

DOC Position

We agree that in this case the Department's previous methodology used to obtain per unit constructed value in U.S. dollars did not provide an accurate result. In order to avoid distortion, we have converted home market cost in local currency to U.S. dollars using the annual average exchange rate.

Comment 14: Home Market Price Cost Test

Respondents maintain that the Department's sales below cost test does not test whether a particular product is sold below its cost of production. Respondents argue that the Department's normal methodology is to compare prices to model-specific COPs. Because respondents were only able to supply the Department with average COP information representing an entire range of rose production, they argue that the Department should compare annual average COP figures to average home market prices of all varieties and stem lengths.

Additionally, respondents state that, to account for price seasonality, the Department must use annual home market average prices to properly test whether home market sales prices permit the recovery of costs in a reasonable time. Respondents refer to the Botero Report as evidence that the unusual seasonal prices of roses allow for ''below average costs over periods of time, including months, that do not cover a full price cycle.''

Petitioner argues that the court has rejected the comparison of production costs with average home market prices. *See, Timken Co.* v. *United States,* 673 F. Supp. 495, 516–17 (CIT 1987).

DOC Position

While it is our normal practice in determining sales below cost to compare the price of each sale in the home market to the cost of production (COP) of that product during the period under investigation, in these investigations we were not able to do so because the respondents do not segregate their cost data by rose type, variety and stem length. As a result, we determined that to compare one yearly COP (the POI in these investigations is one year), which combines all export quality rose costs to prices for each variety of export quality roses would not be appropriate. *See* Comment 5 above. Instead, we combined prices of home market sales for all varieties on a monthly basis to our annual COP, in conforming with our modified cost test for agricultural products, as discussed below in Comment 15.

Although respondents urge the Department to combine individual sales prices for all export quality roses in the home market on a yearly basis to compare to the yearly COP calculation for export quality roses, respondents have not persuaded us that such a radical departure from our procedure is warranted in these circumstances. As discussed in Comment 15, the Department has a specific test for determining whether or not sales are below cost that encompasses recovery of costs within a reasonable time, which we have applied here.

Comment 15: 50–90–10 Test

Respondents maintain that the Department originally intended to change its 10–90–10 test to a 50/50 test whereby, if less than half of all sales were below cost, then all sales should be used in creating weighted-average

FMVs, and if half or more of the sales were found to be sold below cost, then home market sales would be rejected in their entirety and FMV would be based on CV.

Petitioner maintains that respondents have misrepresented the Department's past practice and ignored judicial precedent. Petitioner maintains that the current 50–90–10 test by which the Department removes from consideration ''significant'' quantities of sales made below COP but uses those sales made above cost, is correct. Petitioner maintains that the courts supported the Department's use of remaining above-cost sales as sufficient for FMV in *Timken Co.* v. *United States,* 673 F. Supp. 495, 516–517 (CIT 1987), and that the basic principle applies to all products.

DOC Position

We disagree with respondents. The Department has an established practice which takes into account the realities of selling perishable agricultural products. In *Final Determination of Sales at Less Than Fair Value: Certain Fresh Winter Vegetables from Mexico,* 45 FR 20512, 20515 (March 24, 1980), after examining the nature of sales of vegetables, the Department determined that it was a regular business practice to make a relatively high number of sales of the subject merchandise below cost because of the perishability of the product, which rapidly ages into non-salable merchandise. As a result, the Department determined that were it to apply the normal below cost test used for nonperishable products, *i.e.*, the 10–90–10 test, this would not fairly reflect the economic realities of the fresh vegetable industry. As a result, the Department concluded that it would permit all sales at below cost to remain in the FMV comparison unless more than 50 percent were found to be below cost.

This modified test was clarified in a review of *Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico,* 58 FR 1794, 1795 (January 17, 1991), wherein the Department explicitly stated that the test to be applied for determining sales below cost for perishable agricultural products was a 50–90–10 test, *i.e.,* if between 50 and 90 percent of home market sales consisted of prices below cost, then only the below cost sales were disregarded, while if over 90 percent of sales were below cost then all sales in the home market were disregarded. *See Final Results of Antidumping Duty Review: Certain Fresh Cut Flowers from Mexico,* 56 FR 1795, 1795 (January 17, 1991).

This modified test still remains our current practice and respondent's rationale for the adoption of a straight 50–50 test is an unmerited modification. Were we to adopt respondents' either/or position, *i.e.*, if less than 50 percent are below cost we will use all sales, and if more than 50 percent we will disregard all sales, then we would, in effect, be concluding that 11 percent of widget sales above cost are sufficient to be the basis for FMV but that 49 percent of rose sales above cost are insufficient. This is a an illogical result, which we are not prepared to accept.

Comment 16: Duty Deposit Rate—Roses Shipped But Not Sold

Respondents urge the Department to adjust the deposit rate to reflect the fact that many roses imported into the U.S. perish or are destroyed prior to sale. To avoid over collecting duty deposits on roses that never reach the U.S. market, and since there is no way of distinguishing between roses that will be sold and roses that will be destroyed at the time of entry, respondents argue that the duty deposit rate should be adjusted downward to reflect the quantity of roses shipped to the United States, but not sold. This practice is being used in *Flowers.* Respondents suggest the Department multiply any *ad valorem* rates it calculates by the ratio of total quantity sold divided by total quantity shipped, as reported by each respondent.

Petitioner states that all imports at the time of importation are potentially for sale and, therefore, must bear the appropriate cash deposit rate. Because the percentage of roses that will go unsold varies due to season, weather, problems in transportation, etc., petitioner argues that there is no accurate way to adjust for this potential impact.

Additionally, petitioner states that if the Department does adjust the duty deposit rate to account for roses shipped but not sold, than it is appropriate to adjust the deposit rate to reflect the fact that values entered by Customs are arbitrarily established on consignment entries. Petitioner argues that the use of the calculated USP to derive a cash deposit rate may bear no relation to the value used by Customs for collecting duties. Therefore, petitioner believes that the duty deposit rate should be adjusted upwards so that the duty amount collected reflects the potentially uncollectible duty deposits calculated in the final determination.

DOC Position

We disagree with respondent that the duty deposit rate should be adjusted for roses shipped but not sold. We do, however, agree with respondent, in part, that such adjustment is appropriate for assessment purposes, which are distinct from duty deposit purposes. In the case cited by respondents, *Fresh Cut Flowers from Colombia* 55 FR 20491 (May 17, 1990), the Department indicated that it would make such an adjustment in preparing assessment instructions to the Customs Service. The Department did not make such an adjustment to the duty deposit rates in that case and has not done so in subsequent reviews.

We agree with petitioners that all imports at the time of importation are potentially for sale, and that the percentage of roses which go unsold varies with the seasons. Moreover, this percentage will likely vary with each producer and reseller. Thus, any adjustment contemplated would be speculative. It is preferable to wait until the Department prepares assessment instructions on entries covered by these deposit rates and then make such an adjustment based on the actual experience of the affected companies.

Comment 17: Cash Deposits—The Department's Sampling Technique

Respondents claim that the all others cash deposit rate calculated by the Department is not based on a representative sample of the Colombian rose exporting population—it merely reflects the experience of 16 of the largest exporters. Furthermore, according to respondents, the all others rate disregards the representativeness of such experience. Respondents maintain that this is inconsistent with the Department's statutory requirement that any averages and samples used must be representative of the whole. *See* 19 U.S.C. 1677f–1(b).

DOC Position

We disagree with respondents. The Department's normal practice, in accordance its regulations, is to select that number of the largest exporters of the subject merchandise needed to represent 60 percent of the imports into the United States from the country under investigation. Due to the large number of companies needed to reach 60 percent of imports in this investigation and the administrative burden it would put on the Department's resources to investigate these companies, the Department selected the 16 largest exporters representing over 40 percent of the imports into the United States. *See* the May 2, 1994, Decision Memorandum from the Team to Barbara Stafford.

The methodology used by the Department maximized its coverage of

imports into the United States. The technique of selecting the largest exporters was employed in the *Preliminary Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan,* 55 FR 17779 (April 27, 1990). The other suggested sampling methods, stratified and random, were not selected due to the lack of sufficient industry-wide information on the universe of Colombian and Ecuadorian rose growers (approximately 400 companies in Colombia and 100 companies in Ecuador). The collection and analysis of data to determine an appropriate sampling technique was not reasonably within the power of the Department to undertake. Therefore, we have chosen the most representative sample under the circumstances.

Comment 18: Duty Deposit Rate for Volunteer Companies

Respondents argue that the due process clause of the Fifth Amendment to the U.S. Constitution precludes the Department from requiring cash deposits with respect to companies that the Department refused to investigate. Respondents cite *Kemira Fibres Oy* v. *United States,* Slip Op. 94–120 (CIT July 26, 1994) to support their argument that due process is required in antidumping proceedings. Such a course, according to respondents, would represent an unconstitutional deprivation of property without due process of law. Respondents maintain that the cash deposit rate must be set at zero, and that all cash deposits paid to date should be refunded, and any bonds posted should be lifted, for all companies ready and willing to participate, but not chosen by the Department.

Petitioner also refers to *Kemira Fibres* to support its argument that procedural due process guarantees do not require trial-type proceedings in all administrative determinations. Additionally, petitioner maintains that, as long as the Department adheres to the procedures mandated by Congress and implemented in the Department's regulations, then the Department has afforded interested parties the process due. These regulations, according to petitioner, allow interested parties the right to appear and submit their views on the proceedings of an investigation, but they do not require the Department to investigate every company that requests a company-specific margin.

DOC Position

We agree with petitioner. Although it is the Department's practice to accept voluntary respondents when we have the administrative resources to do so, the Department's regulations do not require that we accept responses from voluntary respondents. Furthermore, pursuant to 19 CFR 353.14(c), the Department is required to investigate exclusion requests only ''to the extent practicable in each investigation.''

Due to the large number of producers and limited administrative resources, the Department was unable to follow its standard practice of investigating 60 percent of the exports of roses into the United States. Accepting these voluntary respondents and investigating exclusion requests would have reduced the number of ''mandatory'' respondents we could select. Because the Department is not required to investigate all voluntary respondents and requests for exclusion, and because the Department followed its regulations and policy concerning voluntary respondents and exclusion requests, we have afforded interested parties the process due.

Comment 19: Amortization and Preproduction Costs

Petitioner argues that the Department should not allow respondents to amortize rose plant costs over periods which exceed the useful lives of rose plants, as reported in respondent's normal accounting records.

Petitioner asserts that amortization of rose plants and preproduction costs should be based on the methodology used by respondents to report their production costs in accordance with normal corporate accounting practices and pursuant to Colombian generally accepted accounting principles (''GAAP''). Petitioner states that it is the Department's well-established and longstanding practice to prohibit respondents' departures from normal practices, except in those instances where those normal accounting practices would distort production costs.

Petitioner claims that the useful lives normally used by these companies are preferable, as they are a function of each grower's plant varieties and cultivation methods. Petitioner states that respondents have not submitted any evidence to establish that their normal accounting practices result in a material distortion of costs or that the useful lives normally used by these companies are unreasonably short. Petitioner also claims that the normal practices of these respondents reflect the preferred cycle for replanting roses.

Respondents claim that the reported rose plant and preproduction costs should be accepted by the Department, since they accurately reflect production costs during the POI and achieve a proper matching of costs and revenues. Respondents contend that their normal financial accounting practices are designed to minimize their taxable income. According to respondents, Colombian tax law (which forms the basis for the growers' GAAP accounting practices) is relatively unrestrictive and allows for the amortization of rose plant and preproduction costs over periods that are in some instances far less than the useful lives of the underlying assets.

Respondents assert that the amortization expense recorded in their financial statements should not be used by the Department, because these amounts do not reflect the amortization of capital expenses over the appropriate period, resulting in a distortion of the production costs of the subject merchandise. Respondents state that evidence on the record regarding their growing practices, plant varieties and cultivation conditions confirms that the useful life of rose plants in Colombia is at least eight to ten years, although such costs are commonly amortized over shorter periods in respondents' books. As support for their position, respondents cite *Fresh Kiwifruit from New Zealand,* 57 Fed. Reg. 13695, 13703 (1992), where the Department required growers to amortize the cost of kiwi fruit vines over the useful lives of the plants despite the fact that, for financial accounting purposes, the cost of the vines had been recognized as an expense in the year of purchase.

DOC Position

We agree with respondents. The Department typically requires respondents to report production costs pursuant to their home country GAAP. The use of home country accounting principles provides the Department with an objective standard by which to measure costs, while allowing respondents a predictable basis on which to compute those costs. However, the Department may reject the use of home country GAAP as the basis for calculating production costs if it is determined that the accounting principles at issue unreasonably distort or misstate costs for purposes of an antidumping analysis. In these instances, the Department may use alternative cost calculation methodologies that more accurately capture the costs incurred during the period of investigation or review.

In determining whether a respondent's normal GAAP depreciation policies are distortive for purposes of our antidumping analysis, it is clearly not the Department's purpose to judge the reasonableness of each asset's depreciable life on an asset-by-asset

basis. Under most circumstances, the depreciable life of an asset is based on the purchaser's best estimate of the asset's economic life at the time of purchase. Obviously, there are any number of events, unforeseen at the time of purchase, that could serve to lengthen or shorten the asset's actual physical life. Typically, the Department does not attempt to account for the fact that estimations of useful life are not always accurate.

In this case, however, we found that Colombian accounting principles permitted growers significant latitude in determining the depreciable lives of their rose plants and in accounting for preproduction costs. Moreover, respondents provided reasonable evidence to support the fact that the useful lives recorded in financial statements were, in many cases, shorter than the plants' economic useful lives. The growers' decision to amortize their rose plant costs over shortened periods appears to have been driven largely by Colombian tax considerations rather than by the basic accounting principle of matching costs and revenues. Therefore, we have accepted respondents' rose plant and preproduction amortization expense calculations for purposes of computing COP and CV, provided that they had correctly capitalized and amortized these same assets from previous years.

U.S. Price Adjustments

Comment 20: Invoice Discrepancies

Petitioner argues that the Department should reject or adjust U.S. prices to account for discrepancies between invoice amounts and ''registro'' prices (the price that appears on official Colombian export documentation) recorded in respondents' books and records.

Respondents argue that there is no merit to petitioner's suggestion that declared Colombian registro prices should be used rather than actual U.S. selling prices. Respondents explain that registro prices represent the growers best estimate of prices. Moreover, respondents assert that registro prices do not meet the statutory definition of U.S. price since they are not the price at which merchandise is sold or agreed to be sold in the United States, nor are they the price at which merchandise is purchased.

DOC Position

We agree with respondents. Due to the volatility of the rose market and the fact that sales are made to unrelated consignees, it is impossible for respondents to accurately record U.S. price at the time of export, thus requiring estimates on export documentation, *i.e.*, registro prices. The amounts listed on the registros do not meet the Department's definition of U.S. price.

Comment 21: Interest Rate

Respondents claim that it is against Department practice and prevailing case law (*United Engineering & Forging* v. *United States, LMI–La Metalli Industriale, S.p.A.* v. *United States*) to apply a Colombian peso interest rate to a U.S. dollar account receivable in calculating U.S. imputed credit expenses. Respondents argue that, in accordance with *Class 150 Stainless Steel Threaded Pipe Fittings from Taiwan,* 59 Fed Reg. 38432 (1994), the Department should have used the lowest interest rate at which respondents borrowed or to which respondents had access, namely the U.S. prime rate.

Petitioner argues that it is inappropriate to estimate a U.S.-dollar denominated interest rate where loans were actually obtained in pesos. Petitioner cites to *Flowers,* where the Department held that ''where there were no U.S. borrowings, we used the actual peso borrowing rate, adjusted to reflect the fact that the credit expense was incurred in dollars and not pesos.'' *See Certain Fresh Cut Flowers from Colombia,* 59 Fed. Reg. 15,1159, 15,164 (March 31, 1994). Petitioner defends the appropriateness of the Department precedent of adjusting the borrowing rate for devaluation. Petitioner notes that such an adjustment reflects that net borrowing costs are lowered to the extent that the dollars later received will be worth a larger number of pesos.

DOC Position

We agree, in part, with respondents. In determining the U.S. interest rate, it is the Department's policy that the interest rate used for a particular credit calculation should match the currency in which the sales are denominated. In cases where there are no borrowings in the currency of the sales made, the Department may use external information about the cost of borrowing in a particular currency (see, *Memorandum from Susan Kuhbach to Barbara R. Stafford: Proposed Change in Policy Regarding Interest Rates Used in Credit Calculations,* dated September 26, 1994). Therefore, the Department used a U.S. short-term interest rate of 7.575 percent, which is the average of the publicly ranged interest rates reported by those respondents that had actual U.S. borrowings during the POI. We consider this to be the best estimate of the U.S. dollar borrowing rates for those respondents that had no short-term borrowings, as it is based on best publicly available data of the actual experience of other rose growers.

Comment 22: Adjustment to Interest Rate

The parties' further arguments concerning the appropriate Colombian peso interest rate are rendered moot.

Company-Specific Comments

Because the Department is using constructed CV rather than third country prices, the parties' comments concerning the appropriate methodology in comparing USP to third country prices are moot. Therefore, we have not addressed company-specific comments relating to this issue. Furthermore, because the Department is using monthly average USPs for all roses, regardless of stem length, variety, or color, the parties' comments concerning issues of stem length, variety, rose type, and rose color are also moot and are not addressed.

Agrorosas S.A.

Comment 23

Respondent argues that the Department should not consider the air ticket and travel expenses, discovered during verification in its accounting records, as indirect selling expenses since these expenses had no relation to the production and sale of the subject merchandise. According to respondent, the air ticket and travel expenses discovered during verification were the personal expenses of one of the company's shareholders (''the shareholder'') who was not employed in any capacity other than as a member of respondent's board of directors. Therefore, respondent maintains that ''the shareholder's'' personal travel was not related to the sale or production of the subject merchandise. Respondent further maintains that the air ticket invoices examined by the Department during verification provide proof that the travel and air ticket expenses in question were the personal expenses of ''the shareholder''.

The petitioner, on the other hand, argues that the travel expenses should be added to the reported indirect selling expense because there is no evidence that the travel expenses shown in the company's accounting records are unrelated to rose sales. According to the petitioner, a presumption arises from the company's books and records that these expenses were related to the company's sales.

DOC Position

Respondent included entertainment expenses as part of the indirect selling expense reported to the Department. As the Department established during its verification of the respondent, those entertainment expenses included, among others, entertainment expenses related to business trips made to the United States and in Colombia during the POI. These business trips were made by company officials as well as by the shareholder referred to above. The reported entertainment expenses did not include any travel or air ticket expenses associated with the business-related trips to the United States and in Colombia. During verification, the Department discovered unreported air ticket and travel expenses recorded in the company's accounting records.

Although we could not ascertain during verification whether all of the travel and air ticket expenses were related to rose sales, we conclude that at least a portion of these expenses were related to rose sales.

First, since the company incurred business-related entertainment expenses attributable, in part, to company officials' trips to the United States and in Colombia, the company must have incurred related air ticket and travel expenses for these trips. Second, because the shareholder, referred to above, was one of the company officials making business trips to the United States and in Colombia, it is reasonable to assume that at least a portion of the air ticket and travel expenses invoiced to the company for that shareholder must have been related to business as well. Finally, the air ticket and travel expenses were officially recognized in the company's accounting records as business-related expenses.

For the reasons outlined above, the Department cannot ascertain whether the air ticket and travel expenses were not tied to the sales of roses. However, because companies are required to report air ticket and travel expenses as expenses related to sales in the companies' audited financial statements, this provides a more reliable source of information as to the manner in which these expenses should be treated. Therefore, the Department included, as BIA, the entire amount of the air ticket and travel expenses discovered during verification in the calculation of the indirect selling expenses related to respondent's rose sales.

Comment 24

The respondent maintains that it did not report any foreign inland freight expenses for the truck used to transport flowers to the airport in the months of January and February because the truck owned and used by respondent during those months was fully-depreciated and reflected no costs on respondent's records. The respondent further states that the truck rental expenses for the month of October of the POI were included in the amount reported in the month of December because the company was billed for the month of October in the month of December. Therefore, the respondent requests that the Department not use BIA for trucking expenses in those three months.

The petitioner argues that there is no evidence on the record that respondent did not incur truck rental expenses for the month of January.

DOC Position

In the Department's preliminary determination we used, as BIA, the monthly average truck rental expenses for the months of January, February and October because respondent reported no trucking expenses for those months. However, at verification, we established that respondent used its fully-depreciated truck for the months of January and February, and we found no record of expenses related to the operation of respondent's truck during those months. We found that respondent began renting a new truck beginning in February 1993, while it continued to use its fully depreciated truck until the end of that month. We also established that the truck rental expenses not reported for the month of February were included in the amount reported for the month of March. Similarly, the truck rental expenses not reported for the month of October were, in part, included in the amount reported for the month of December.

Because we found no evidence of expenses related to respondent's truck for the months of January and February, and because we established that respondent included the truck rental expenses for the months of February and October in the amounts reported to the Department for following months, the Department used these actual expenses, and not BIA, in its calculations of these freight expenses.

Comment 25

The respondent requests that the Department not use BIA for the fuel expenses related to the transportation of roses that respondent was unable to separately identify and report to the Department in its questionnaire responses. Instead, the respondent requests that the Department use the estimated monthly fuel expenses examined by the Department during verification.

The petitioner maintains that the estimated fuel and maintenance costs were submitted for the first time during verification and should, therefore, not be accepted as a basis for a final determination. The petitioner further maintains that the purpose of verification is to verify the accuracy of the respondent's information already submitted on the record, not to collect new information. Therefore, the petitioner requests that the Department use BIA in its calculation of such foreign inland freight expenses.

DOC Position

We agree with the respondent. In its August 24, 1994, submission, respondent stated it could not determine the value of fuel expenses related to the transportation of roses separately. However, respondent also stated that it included fuel expenses related to the transportation of roses in the fuel purchase expenses reported in the CV table (see Appendix 7 of the respondent' August 24, 1994, submission). Absent any specific information on the fuel expense related to the transportation of roses, the Department, in its preliminary determination, used as BIA the monthly average fuel expense amount reported in the CV table.

Given the above-referenced facts on the record, we disagree with the petitioner that the information collected during verification with respect to fuel expenses is new. The information submitted on the record does include fuel expenses. However, due to the difficulty of identifying these expenses separately, the respondent included them in the overall fuel charges of the company.

During verification the respondent was able to provide information to substantiate an estimated monthly fuel expense amount. The estimated fuel charges were based on supporting documentation showing the distance in kilometers from the farm to the airport, the per gallon cost of fuel, and the number of gallons of fuel consumed per kilometer for the rented truck.

The method used by the respondent to estimate the fuel charges, and the supporting documentation collected during verification constitute sufficient evidence and a viable means which enabled the Department to identify the fuel expenses related to rose transportation from information already submitted on the record prior to verification. For the above reasons, the Department used respondent's estimated monthly fuel expense

amount, instead of BIA, in the calculation of these foreign inland freight expenses.

Comment 26

Respondent states that the December 1993 amortization expense relating to its new farm should be included in the CV calculation since it started producing roses during the POI.

Petitioner states that to the extent that sales of roses from the new farm were included in the sales listing, costs incurred with respect to such farm should also be reported.

DOC Position

The Department agrees with both the petitioner and the respondent in that the December 1993 amortization associated with the preproduction costs of Greenhouse B–1 should be included in constructed value. During verification, it was found that rose production of saleable roses had begun in December 1993. The Department, therefore, increased respondent's submitted costs to include the December amortization expense.

Comment 27

Respondent states that the allocation of the Bogota office costs between subject and nonsubject merchandise is equitable and reasonable. Respondent argues that the Department should not charge these costs solely to subject merchandise because the only production-related expenses incurred at the Bogota office relate to the monthly Board of Directors meeting. All other managerial functions associated with rose production are performed at respondent's farm office.

Petitioner contends that corporate expenses incurred at the Bogota office should be added to G&A in full and not allocated based on use of the office. Petitioner argues that there is no basis to exclude the expenses of the Bogota office since there is no evidence that the owner does not oversee the rose business from this office. Petitioner's allegation that the office is used for a construction business is belied by the fact that the office expenses are carried on respondent's corporate income statement and tax return.

DOC Position

We agree with respondent. At verification, respondent demonstrated that the Bogota office was used mainly by a shareholder to manage other businesses which are not associated with rose production. The Department also determined that the methodology used to allocate the costs of the office between subject and nonsubject merchandise was reasonable. Respondent allocated the Bogota office expense based on the number of days during which the company uses the office for its Board of Directors meeting. For the final determination, we increased respondent's submitted G&A expense by an allocated portion of the Bogota office costs.

Comment 28

Respondent argues that the Department should not account for certain expenses paid by the company on the owner's behalf as G&A costs since these expenses were unrelated to the production or sale of the subject merchandise. Respondent states that in past cases, the Department has not required respondents to include similar owner expenses in CV even when such expenses were recorded in the accounting records of the company. Respondent cites in support of its position *Final Determination of Sales at less Than Fair Value: Fresh Kiwifruit for New Zealand*, 57 Fed. Reg. 13695, 13704 (April 17, 1992). Respondent also argues that these expenses should be considered a dividend paid by respondent to its majority shareholder and, thus, should not be accounted for as salary or compensation since the shareholder performs no day to day management of the company.

Petitioner contends that the expenses paid by the company on the owner's behalf should be included in G&A since there is no evidence that such costs were unrelated to the rose business, and because they were carried on the respondent's books.

DOC Position

We did not include in CV the personal expenses paid by the company on the owner's behalf. At verification, the expenses in question were demonstrated to be personal in nature, tax motivated, and not related to the production of the subject merchandise. The Department reached a similar conclusion in the *Final Determination of Sales at less Than Fair Value: Fresh Kiwifruit for New Zealand*, 57 Fed. Reg. 13695, 13704 (April 17, 1992) in which personal expenses of an owner were not included in COP/CV since they were not related to the production of the subject merchandise.

Caicedo Group

Comment 29

Respondent argues that the Department should not have used a high BIA rate for its sales through an unrelated importer. It states that while most of its sales to the United States are through its related importer, when the volume of exports is too great for the related party to handle, respondent will sell roses through other unrelated importers. One of these unrelated parties through which the respondent sold during the POI, according to respondent, failed to supply it with the detailed information needed for the response to the Department's questionnaire.

Respondent also states that at verification, it supplied what it could relating to these sales, including copies of written requests to the unrelated importer to supply the necessary information and a copy of a negative reply from this unrelated importer to its request. The respondent states that, because it did not have the ability to compel the unrelated importer to supply it with information, that it would be unfair to apply a punitive BIA rate to these sales. The respondent states that due to the high value and the small volume of these sales the Department should leave these sales out of the margin calculations altogether. Respondent adds that, if these sales are not excluded, the Department should apply to them the average margin found with respect to the remaining sales by the respondent.

The petitioner argues that where a party failed to supply U.S. sales data, the Department should apply ''Tier 1'' BIA. It cites 19 U.S.C. 1677e(c), which, it states, prescribes the use of ''best information'' whenever requested information is not supplied, without regard to motive. The petitioner also states that the circumstances appear to indicate that the unrelated importer acted as a consignment agent, in which case there would typically be growers reports or other documentation pertaining to transactions. The petitioner adds that respondent is properly responsible if its agent withholds data.

DOC Position

We agree with respondent. At verification, we closely examined the quantity and value of sales to this consignee and noted no discrepancies with respect to either quantity of sales to this importer or respondent's claims about the availabilty of price information needed to respond to the questionnaire.

The Department has the discretion to exclude certain sales. In *Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 54 FR 15467 (March 23, 1993), the Department excluded sales where the volume of sales was insignificant. We

determine that the sales through one of the respondent's unrelated U.S. customers during the POI were insignificant in volume. Therefore, we excluded these sales from our margin calculation.

Comment 30

Respondent argues that in calculating U.S. indirect selling expenses, the Department should include the value of local Miami sales in the denominator of the equation. It claims that it inadvertently excluded local sales in the value of sales used to calculate the percentage applied to gross unit price. It adds that in accordance with the Department's instructions, however, all U.S. sales, including local sales, have been included in the U.S. sales listing.

The petitioner provided no comments on this issue.

DOC Position

We agree with the respondent. While selling expenses associated with local sales may not be as great as those associated with sales in the normal course of trade in the market, they are nonetheless actual selling expenses that were incurred and examined at verification. Therefore, we have included the value of local Miami sales in the denominator of the U.S. indirect selling expense calculation.

Comment 31

Petitioner argues that the costs associated with the freeze which occurred on December 31, 1993, the last day of the POI, were ordinary expenses and should not be deferred solely for the antidumping investigation. Petitioner further claims that the freeze was not unusual in the industry and that the company treated the cost associated with the freeze as a current year expense in its tax return.

Respondent argues that the freeze, which destroyed a number of rose plants, was an extraordinary event. Respondent notes that the damaged plants were not scheduled to produce roses until the following year. Finally, respondent argues that under Colombian tax law it is permissible to write off a loss at the time of the event, despite the fact that the actual loss related to future income.

DOC Position

We believe that the costs resulting from the freeze do not relate to the production and sale of roses during the POI. Instead, given the date on which the freeze occurred and the fact that the lost and damaged plants had not yet begun to produce roses, we have determined that these costs should be recognized in a future period.

Flores la Fragancia

Comment 32

The petitioner maintains that there is no evidence that the respondent's breeder customers purchase merchandise that is different from the type of export quality rose which it sells to its retailer customers. In addition, the petitioner maintains that sales to breeders are made ''for home consumption'' and should be included in the Department's analysis. Alternatively, the petitioner argues that the respondent's sales to breeders do not constitute a distinct and separate level of trade because the respondent has not demonstrated that breeders' functions are different from the functions of any other type of purchaser as outlined in the *Notice of Preliminary Determination: Disposable Pocket Lighters from Thailand* 59 FR 53414 (October 24, 1994). Finally, the petitioner alleges that, even though the respondent is now requesting that the Department exclude sales to breeders in its final analysis, the respondent initially relied on the breeder sales made in the home market in order to avoid the need to report third country sales.

The respondent maintains that the Department should exclude sales to breeders because breeders are end users that are concerned only with whether the rose has a sprouting eye and not whether the rose is export quality or a cull. In other words, the breeder is not buying the rose, rather the plant material that is harvested with the rose. Alternatively, respondent maintains that, if the Department insists on using sales to breeders in its analysis, it should treat breeders as a distinct level of trade and not as retailers since breeders do not resell the roses purchased from it.

DOC Position

We agree in part with the respondent. We examined invoices at verification which demonstrated that breeders purchase both export quality roses and culls from the respondent. We see no reason to distinguish whether the export quality rose does or does not have a sprouting eye because the rose is still considered subject merchandise. In this case, sales to breeders must be considered as a home market sale of subject merchandise when they are sales of export quality roses. Therefore, we have used sales to breeders in our COP test. Since all home market sales are below cost, we are comparing all U.S. sales to CV. Therefore, the issue of whether breeders constitute a different level of trade is moot.

Finally, since the respondent correctly reported such sales in its home market sales database, we find that the petitioner's argument that the respondent tried to avoid reporting third country sales is not supported by the evidence on the record.

Comment 33

The respondent maintains that all sales included in the customer category labelled ''sales to individuals'' were made to individuals closely associated with the respondent (*e.g.*, mostly employees and relatives of the owners, the remainder being friends of the owners). Therefore, the respondent requests that the Department exclude all sales included in the customer category from our analysis. Finally, the respondent states that excluding these sales would be consistent with our decision to exclude other respondents' sales to employees from the analysis in the preliminary determination.

The petitioner did not provide comments on this issue.

DOC Position

We agree with the respondent. We determined at verification that the vast majority of customers included in the customer category ''sales to individuals'' were individuals related to the respondent. Documentation collected at verification demonstrates that the quantity and value of sales attributable to unrelated customers within the customer category is insignificant in terms of the total quantity and value amount reported under the customer category. Finally, we are comparing all U.S. sales to CV because, even including these home market sales, all sales are below COP. Therefore, we will not be using sales grouped under the category ''sales to individuals'' in our LTFV analysis.

Comment 34

The petitioner contends that there is a large and unreconcilable discrepancy between the quantity shipped to and the quantity received by the respondent's U.S. subsidiary during certain POI months. The petitioner maintains that as a result of the difference between what export documentation shows the respondent shipped to the United States and what sales documentation shows the U.S. subsidiary sold during the POI, the respondent did not report a significant portion of its U.S. sales of subject merchandise. Therefore, the Department should find the

respondent's U.S. sales listing to be unreliable and resort to BIA.

The respondent states that the quantity shipped to its U.S. subsidiary reconciles with the quantity received by the U.S. subsidiary in the United States and that documentation collected by the Department at verification demonstrates that the U.S. sales listing is reliable.

DOC Position

We agree with the respondent. It was demonstrated at verification that, for the three selected POI months, the quantity shipped by the respondent to the United States reconciles with the quantity received by the U.S. subsidiary. In cases where differences existed between the amount of merchandise shipped from Colombia and the amount received in the United States, the respondent provided a reconciliation of the differences. Therefore, we have used the respondent's U.S. sales data in our analysis because the U.S. sales listing is reliable.

Comment 35

The petitioner contends that we should resort to BIA due to the number and frequency of data problems such as the mis-reporting and under-reporting of sales information from invoices and grower-reports.

The respondent maintains that it provided the Department with all information necessary to correct data-entry errors at verification and that the Department verified all corrections. The respondent points out that these errors all arose as a result of manually entering data for tens of thousands of home market sales and providing the Department with one monthly variety-specific stem-specific U.S. price during each POI month. Because the errors were unavoidable and most, if not all, were brought to the attention of the Department's verification team, the respondent requests that the Department use its sales data in the final analysis.

DOC Position

We agree with the respondent. We thoroughly tested the respondent's sales databases and established that the errors mentioned above were inadvertent, isolated, and small in magnitude, all of which the respondent either brought to our attention or were errors which we discovered as a result of respondent providing all requested information. Therefore, we have used respondent's response in our analysis.

Comment 36

The petitioner alleges that the respondent's methodology for determining returned quantities (described in the respondent's September 12, 1994, submission) is based on returns of both subject and non-subject merchandise and that the Department should not allow the adjustment. In addition, the petitioner maintains that, even though the respondent's reported monthly returned quantities were less than what would have resulted using an alternative methodology described in the verification report, the Department should not correct for the respondent's error because it would greatly benefit the respondent by producing increases in the average unit value of the quantity sold.

The respondent states that it did not include amounts of non-subject merchandise in its allocation methodology. The respondent further notes that the methodology it used conservatively calculated its quantity of returns. Therefore, the respondent maintains that the Department should accept its returned credit quantity allocation method.

DOC Position

We agree with the respondent. As verification demonstrated, information contained in the credit memos is not contained in the respondent's U.S. subsidiary's computer system. For this reason, the respondent used a monthly allocation method. Furthermore, we find that the respondent did not include returns of non-subject merchandise in its monthly allocation method. After examining the U.S. sales database, we determined that the respondent had in fact correctly applied the allocation method described in its September 12, 1994, submission. The verification report notes that had the respondent used the returned credit *value* factors (not the returned credit quantity factors), the total quantity returned amount for the POI would have been greater than the amount the respondent in fact derived using its allocation method. This does not, however, signify that the respondent's allocation methodology was improperly or incorrectly computed. Thus, we have accepted the respondent's returned credit quantity allocation method.

Comment 37

The petitioner contends that respondent's foreign inland freight monthly per-unit amounts shown in the verification report are based on quantity information contained in the registros and should not be used. In addition, the petitioner questions the variation in some of the monthly per-unit amounts. Finally, the petitioner maintains that the respondent should not have allocated the freight costs over gross unit price, since prices for different varieties and colors fluctuate substantially and such an allocation method would understate inland freight charges on the least expensive roses. Because of these alleged errors, the petitioner requests that the Department use, as BIA, the highest monthly per-unit amount to calculate freight expenses for all POI months.

The respondent states that the quantity figures used in the freight calculation were verified by the Department and that it did not allocate its freight costs over gross unit price. In addition, the respondent states that monthly freight costs fluctuate significantly because the volume of shipments can be vastly different for a given month. Therefore, the respondent maintains that the Department should accept its methodology and not reject it because freight costs differ from one month to another in the POI.

DOC Position

We agree with the respondent. It was demonstrated at verification that its revised freight expense calculation is not based on quantity amounts from the registros, but on amounts from invoices and grower reports. Specifically, the quantity amounts of roses and non-subject merchandise sold to third countries are from invoices and the quantity amounts of roses and non-subject merchandise sold in the U.S. market are from grower reports. Therefore, respondent is using actual quantities to derive its freight expense.

Regarding the petitioner's concerns that questionable variations exist for some of the monthly per-unit amounts, the respondent derived its monthly freight expenses by determining the freight expense it paid and the quantity amount it exported for each month based on when it recorded the expense in its accounting records and when it exported its product based on invoices. We have no reason to question this methodology because the calculated expenses accurately reflect the amounts respondent incurred.

Finally, the respondent did not allocate freight expenses over gross unit price. As found at verification, the respondent derived monthly freight per-unit expenses using only quantity and freight expenses as variables. Therefore, we have accepted the respondent's freight allocation methodology and have used the monthly per-unit amounts.

Comment 38

Respondent states that, while it normally accounts for the cost of greenhouse plastic as an expense in the

year of purchase, for its submission, it correctly capitalized the cost of the plastics and amortized them over a two-year period. Respondent maintains that its greenhouse plastic generally remains a productive asset for at least two years and, thus, to expense these assets in the year of acquisition would distort its current production costs. Respondent further argues that the Department has accepted a two-year amortization period in the *Flowers* proceedings.

The petitioner notes that respondent's amortization methodology for greenhouse plastic was created by the company solely for its submission. Petitioner contends that the submitted costs must be rejected because the amortization schedule is incomplete and since respondent has not demonstrated that its normal accounting practices distort costs.

DOC Position

As explained in the general issues section, Comment 19, we have allowed companies to capitalize and amortize greenhouse plastic costs even though respondents normally treat such costs as expenses in the year of purchase. Respondents must demonstrate, however, that they correctly capitalized and amortized similar costs from all previous years (*see*, Exhibit 5 of the cost verification report). Respondent failed to satisfy this requirement. We have therefore calculated respondent's greenhouse plastics cost using the actual costs incurred as reported in the company's 1993 accounting records.

Flores Mocari

Comment 39

The petitioner alleges that certain verification exhibits indicate that respondent did not report all indirect selling expenses, *e.g.*, advertising.

The respondent maintains that it reported all indirect selling expenses. The respondent points out that the expense amounts identified by the petitioner include amounts associated with months prior to the POI. Second, the respondent points out that it makes adjustments to its accounts each month and that the total amounts of the accounting adjustments will cancel each other out by the end of the fiscal year. Third, the respondent states that the verification team examined whether numerous selling expenses were incurred as reflected in the accounting books and found no unreported selling expenses. Fourth, the respondent maintains that, where the expense was associated with both G&A and sales, it appropriately allocated the expense between administration and sales departments. The respondent maintains that the Department should accept its indirect selling expense allocation methodology.

DOC Position

We agree with the respondent. In the course of verifying this expense we examined and found that amounts from eight randomly selected accounts in the libro auxiliar for July 1993 were correct as shown on the respondents's indirect selling expense worksheet. We found that the respondent reported all of its selling expenses from its financial records. However, the petitioner points out that amounts from two additional accounts in the auxiliar do not correspond with amounts on the worksheet. Respondent's explanation that it moved some indirect selling expenses among the POI months in order to match monthly sales expenses with the corresponding sales is reasonable and we examined evidence of this practice at verification.

We also determine that certain additional expenses should not be included in respondent's indirect selling expense calculation. We did not select for examination at verification respondent's method for allocating a certain expense to sales and a portion of that expense to G&A. Therefore, we have accepted respondent's methodology. Finally, we examined the five expenses noted in the petitioner's brief at verification and found that the respondent did not incur these expenses.

Comment 40

The petitioner argues that respondent's related U.S. subsidiary should have allocated its grower/marketing expenses on a value of sales or cost of sales basis rather than per grower because the U.S. subsidiary cannot isolate the associates with only sales of merchandise produced by the respondent. Rather, the petitioner maintains that the expense should cover sales of subject merchandise of the U.S. subsidiary made on behalf of all growers.

Respondent states that its U.S. subsidiary's grower/market expenses associated with making its sales and cultivating its relationship with respondent are minimal since this relationship is well-established. The respondent points out that its U.S. subsidiary should have probably excluded all expenses of the grower department but was instead conservative and allocated these expenses over the number of suppliers. Therefore, the Department should accept its U.S. indirect selling expense allocation methodology.

DOC Position

We agree in part with the petitioner. Because the U.S. subsidiary could not determine from its accounting records the amount of grower/marketing expenses associated with a specific grower, we cannot rely on the allocation method used by the U.S. subsidiary. Therefore, to account for the sales amount of merchandise produced by respondent that its U.S. subsidiary sold during the POI, we determined the grower/marketing expense associated with respondent by first deriving a factor (gross sales of merchandise produced by respondent divided by the total product value sold by its U.S. subsidiary). We then multiplied this factor by the amount of grower/marketing expenses noted in the U.S. subsidiary's financial statements to arrive at a grower's expense associated with respondent.

Comment 41

The petitioner alleges that the respondent arbitrarily derived an air freight expense allocation factor for three periods during the POI and that, instead, it should have derived freight allocation factors for each POI month. The petitioner argues that the respondent's methodology effectively smoothes out monthly fluctuations and produces higher freight rates during the period when U.S. sale prices are highest.

The respondent maintains that its methodology properly reduces inaccuracies caused by inventory carryover without masking differences in monthly air freight rates. Therefore, we should accept its freight expense allocation methodology as reasonable.

DOC Position

We agree with the respondent. At verification it was demonstrated that the respondent created three distinct time periods within the POI corresponding to substantial rate changes. Within each period, the air freight rates incurred were similar. Accordingly, the respondent's air freight methodology is not arbitrary. Moreover, using monthly freight rates would not account for significant amounts of merchandise entering the latter part of one month but sold in the early part of the following month. Finally, we find that, there were significant rate changes in specific months of the POI, the different rate changes are highlighted by the periods used by respondent. Using monthly rates would not account for the fact that one would be deriving a freight amount

for merchandise sold by using a monthly freight rate which may have been higher or lower then the rate applicable when the merchandise entered inventory.

Comment 42

The petitioner maintains that the Department should include reported sales which listed a box charge (a packing charge that the related importer charges the unrelated buyer) but a zero price.

The respondent argues that these are sample sales and that the Department stated that it would exclude sample sales in the preliminary determination. Respondent argues that the Department should exclude these sales in the final determination. In addition, the respondent requests that the Department allocate the movement expenses and packing costs of its sample sales over the total U.S. sales value.

DOC Position

It is within the Department's discretion to exclude U.S. sales when it finds that these are clearly atypical and not part of the respondent's ordinary business practice, *e.g.*, sample sales (*see Final Determination of Sales at Less Than Fair Value: Professional Electric Cutting and Sanding/Grinding Tools from Japan* (58 FR 30144, 30146, May 26, 1993)). However, we must also find that to use these sales would undermine the fairness of the comparison.

We have used transactions with positive box charge amounts in our analysis because these transactions are typical and part of the respondent's ordinary business practice.

Comment 43

The respondent maintains that one of the Department's verification issues is based on a misunderstanding of how the company accounts for preproduction costs in its normal books and records. Respondent claims that verification exhibits on the record conclusively support the fact that it ordinarily capitalizes preproduction costs in its financial statements.

Petitioner contends that respondent should not be permitted to explain its general ledger system and accounting practices in a case brief. Petitioner argues that respondent's case briefs are not intended to be a vehicle for the company to submit new information relating to matters that were not covered during verification.

DOC Position

This issue is moot since, despite respondent's normal accounting for preproduction costs, the Department allowed the company to capitalize and amortize its preproduction costs. See General Comment 19.

Comment 44

Respondent states that during verification, the Department found that there was a difference between the amount of preproduction costs capitalized for a particular test month and the amount recorded on respondent's preproduction cost amortization schedule for the same month. Respondent argues that this difference is insignificant and, thus, the Department need not adjust its reported rose production costs to account for the discrepancy.

Petitioner contends that in the interest of accuracy, the Department should correct for this differential in preproduction costs capitalized no matter how insignificant the effect.

DOC Position

We disagree with respondent that the difference between the amount of capitalized preproduction costs and the amount recorded on its preproduction cost amortization schedule for the same month is insignificant. The example highlighted in the cost verification report related to only one month of the POI. Yet, this difference is present in all twelve months of the POI. We therefore adjusted for the entire amount of underreported amortization relating to respondent's preproduction costs.

Comment 45

Petitioner claims that certain expenses recorded as cost of goods sold in respondent's financial statement should not be reclassified as G&A. Petitioner argues that respondent failed to provide evidence sufficient to support its claim that its expenses had been misclassified in the company's financial statements.

Respondent contends that the evidence it provided at verification clearly supports its reclassification of these expenses from cost of goods sold to G&A.

DOC Position

We agree with respondent that sufficient evidence was provided at verification to support the reclassification of these expenses to G&A. We therefore made no adjustment was made for purposes of the final determination.

Comment 46

Petitioner claims that respondent's SG&A costs should not be reduced by payments received from another company, since a portion of respondent's SG&A costs have already been allocated to that company. According to petitioner, if the Department were to allow the respondent to offset its SG&A by the payments received from the other company, it would effectively double count the offset. Additionally, petitioner argues that the revenue received by respondent from the other company is neither short term nor related to the rose production operations.

Respondent argues that the amounts received from the other company represent an offset to expenses recorded on respondent's books. According to the respondent, there is no separate allocation of SG&A expenses to the other company and, thus, the payments received from the other company are not double counted on respondent's books.

DOC Position

We agree with respondent that the amounts received from the other company are not double counted. The full amount of SG&A expenses are recorded on respondent's books. None of these expenses are allocated to the other company. By offsetting these total expenses with payments received from the other company, respondent is in effect charging the other company for expenses incurred on its behalf.

Comment 47

Petitioner argues that exchange gains and losses related to sales transactions and debt should be included in respondent's constructed value calculation. According to petitioner, failure to take into account these exchange gains and losses will result in the misstatement of respondent's costs.

DOC Position

We agree with petitioner in part. It is our practice to exclude from costs the exchange gains and losses arising from sales transactions since these amounts do not relate to production of the subject merchandise. Other exchange gains and losses associated with respondent's debt, however, relate to the company's overall operations. Thus, we have included these amounts in our calculation of respondent's rose production costs.

Grupo Andes

Comment 48

Respondent states that the Department should use the interest rate it reported for calculating credit expense. The respondent argues that the sales verification report acknowledges that: (1) The company used a variable rate demand note interest rate for calculating U.S. credit expense; and (2)

the terms of the bond define the interest rate as a weekly rate using a certain rate, which is the rate for high quality, short-term or demand, tax-exempt obligations.

Respondent states that if the Department decides that this rate should not be used, then it should use the prime rate for calculating U.S. interest credit expense.

DOC Position

We disagree with the respondent. While the respondent accurately describes the terms of the bond, the Consolidated Balance Sheet for Continental Farms (respondent's related subsidiary) shows that only the current portion of the bond is accounted for under ''Current Liabilities''; the much larger portion of the bond is listed under ''Long-term Debt.'' Thus, we view this obligation and the interest expense associated with it as long term.

Also, regarding U.S. credit expense, as noted in the verification report, respondent's U.S. credit expense verification exhibit contained a written explanation of its credit period calculation methodology from an accounting manual. This manual states that the methodology ''does not work well with a seasonal business.''

Therefore, we have recalculated the credit period using a different methodology but the same data contained in respondent's verification exhibit. In addition, we have disallowed respondent's interest rate and, instead, applied an average of publicly ranged interest rates. (*See* Comment 21.)

Comment 49

The petitioner argues that respondent could not identify export selling expenses from its books and records. It states that respondent earlier reported having an ''export department'' that prepared weekly and monthly reports concerning export quality roses sold in Colombia. The petitioner argues that expenses incurred by this department should be included in the total amounts allocated to indirect selling expenses incurred in Colombia.

The petitioner also states that, with regard to indirect selling expenses incurred in the United States, the verification report indicated that indirect selling expenses were allocated over ''total global sales.'' The petitioner states that given that Continental Farms is located in the United States and that the respondent is attempting to derive U.S. selling expenses, such an allocation appears overly broad.

Respondent states that it has included in its indirect selling expenses incurred in Colombia all such expenses that could be identified based on available accounting records. Respondent also states that the petitioner's suggestion regarding administrative expenses is unreasonable. With regard to indirect selling expenses incurred in the United States, the respondent states that those expenses were allocated over total sales of all products by Continental Farms, not Andes as the petitioner seems to assume.

DOC Position

We agree with the respondent. At verification, the Department found no information to indicate any U.S. indirect selling expenses incurred in Colombia beyond those identified. Also, we found no significant discrepancies with the information examined.

With regard to indirect selling expenses incurred in the United States, the respondent allocated such expenses over sales of all products to all markets by Continental Farms only.

We agree with the respondent that its allocation methodology was reasonable based on what was examined at verification.

Comment 50

Petitioner notes that for purposes of computing U.S. value added, respondent allocated net profits between U.S. and home market production costs based on the transfer price charged by the respondent to its U.S. affiliates. Petitioner states that the Department has always supported a cost based profit allocation methodology in further manufacturing cases. Petitioner therefore argues that the Department should exclude all of respondent's U.S. value added sales from the LTFV margin calculation.

Respondent acknowledges that the Department normally allocates profit on the basis of cost in further manufacturing cases. Respondent maintains, however, that because of the unique nature of the rose market and the volatility in its pricing, profits should be allocated on the basis of price, not cost.

DOC Position

We agree with petitioner that our normal practice is to allocate profit in further manufacturing cases on the basis of relative cost. *See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea* (54 FR 15467, March 23, 1993). Respondent has provided no evidence or support for its argument that, because of price volatility in the roses market, our normal practice distorts the antidumping analysis. Therefore, we have allocated the profits for further manufactured roses on the basis of cost and have included these sales in our analysis.

Comment 51

Respondent argues that the Department's cost verification report significantly overstates the amount of G&A expenses of the respondent that should be allocated to rose production. Respondent notes that the Department's report indicates G&A costs inclusive of the intercompany purchase of flowers. Respondent argues that the respondent's intercompany purchase of flowers for resale should not be considered part of the company's G&A expenses. In addition, respondent believes that the Department's calculation of the respondent. G&A expenses does not take into account the company's other income which should be deducted from the G&A expenses. Finally, respondent asserts that the respondent's net G&A expenses should be allocated among the different flower types sold by respondent.

Petitioner argues that respondent's claims regarding other revenue are not support by the record. Petitioner argues that respondent's case brief is not the place for explaining data that should have been presented during verification. Accordingly, petitioner does not believe that there is any basis to credit respondent's G&A expenses with the offset for respondent's other revenue.

DOC Position

We agree with respondent that the costs of intercompany purchases of flowers should not be included in the calculation of G&A expenses. However, we also agree with petitioner that the record does not support respondent's claims for other income offsets to the G&A expenses. Accordingly, we have rejected respondent's argument and calculated the G&A based upon the costs examined at verification.

Grupo Benilda

Comment 52

Respondent maintains that it reported home market sales in U.S. dollars because the home market sales transactions were denominated and invoiced in U.S. dollars. According to respondent, the home market customer paid the peso equivalent of the invoiced dollar amount, using the exchange rate on the date of payment. For this reason, respondent argues that the Department should not attempt to recalculate the value of these sales by converting dollars to pesos and then converting pesos to dollars because, respondent claims, this would distort the real value of these sales.

With respect to the short-term borrowing rate to be used in calculating the home market imputed credit, respondent argues that its dollar borrowing rate should be used because the home market sales were negotiated, contracted for, and denominated in dollars. Respondent further maintains that it would not make economic sense to borrow at a peso borrowing rate to finance dollar denominated accounts receivable. Therefore, respondent requests that the Department continue to use respondent's dollar borrowing rate in its calculation of home market credit expenses.

DOC Position

During respondent's verification, we established that respondent invoiced its home market customers in U.S. dollars and received the equivalent value in pesos at the date of payment. We were able to trace the payments to the company's records and establish that the payments made to the company in pesos reflected the prevailing exchange rates at the time of payment.

It is the Department's practice to accept charges in the currency in which the charges are made. In this instance, home market prices were charged in dollars. Therefore, the Department found it appropriate that respondent's home market sales were reported in dollar value since the dollar value was the currency in which the sales transactions were made. Furthermore, since home market sales were transacted in dollars and the payments made, although in pesos, were based on constant dollar value, there is no distortion. Using respondent's dollar borrowing rate in the calculation of the home market imputed credit, is, therefore, appropriate.

Comment 53

Respondent argues that the air freight account examined by the Department during verification reflects expenses entirely related to air freight for products shipped to a customer in a foreign country. Respondent maintains that the Department collected documentation at verification which supports this. Respondent further maintains that the suggestion made in the Department's verification report that half of the amount reported in the air freight account be added to the reported foreign inland freight is based on a misunderstanding of the facts, and it would be incorrect to include any portion of this account in the Department's calculation of foreign inland freight expenses.

The petitioner argues that there is no evidence on the record to show that the air freight expenses, reported in one of the company's transportation accounts, are related entirely to air freight expenses for that foreign country. According to the petitioner, the supporting documentation collected during verification only supports the conclusion that air freight expenses for one month (*i.e.*, the month of August) were for shipments made to the foreign country. According to the petitioner, the exhibit collected by the Department does not establish that all entries under this account code were destined for that foreign country and does not identify the portion of these expenses related to inland freight. The petitioner argues that because respondent failed to report the inland freight expenses included in the account, the Department should include the full amount of the charges in the calculation of inland freight expenses.

DOC Position

At verification we examined one of the company's accounts related to transportation titled ''Transportes Aereos'' (Air Transportation). A company official stated that the entries made to that account were for inland and air freight expenses related to products shipped to a customer in a foreign country. To verify this statement we examined all supporting documentation for one month.

The documentation consisted solely of air freight charges, which is indicative that the entries made under this account were related to air freight, not inland freight. As there is no evidence on the record showing that the air freight account in question is related to inland freight, we have not included any amount from this account in our calculation of respondent's foreign inland freight expenses.

Comment 54

The petitioner requests that all the expenses related to Federal Express discovered during verification be allocated to rose sales in the U.S. market. The petitioner argues that there is no evidence that the Federal Express charges incurred by the respondent's related company in the United States were not shipment expenses on sales to U.S. customers, nor is there any basis to assume that such expenses should be allocated to sales outside the United States or to merchandise other than roses. According to the petitioner these expenses should be treated as direct selling expenses related merely to rose sales.

According to the respondent, these expenses should be appropriately added to the ''other expenses'' field, or to indirect selling expenses incurred in the United States.

DOC Position

At verification, company officials discovered unreported expenses related to Federal Express. However, because, in general, we cannot accept new information at verification and, due to time constraints we were unable to verify the exact amounts of these expenses to each destination and for each merchandise class, we were only able to verify the total expense. Thus, the Department, as BIA, included the total of these expenses in the calculation of movement charges related to U.S. rose sales.

Comment 55

Respondent maintains that at the preliminary determination, the Department double counted certain expenses related to U.S. duty, U.S. brokerage and handling, and movement charges. According to respondent, the Department applied BIA for the above-referenced expenses for certain ESP sales, even though these expenses were already included in respondent's indirect selling expenses. Respondent, therefore, requests that the Department eliminate the BIA values and count the actual expenses as part of indirect selling expenses, as reported. Furthermore, respondent argues that delivery and brokerage expenses are functions performed by respondent's related U.S. importer, and that such expenses are included in the importer's accounting records as indirect selling expenses. Therefore, respondent argues that it serves no purpose to attempt to break these costs out and report them separately.

Petitioner, on the other hand, argues that the movement expenses included in the reported indirect selling expenses are not properly classified as indirect selling expenses and are not entitled to be offset under 19 CFR § 353.56. According to petitioner, respondent should bear the burden of identifying its U.S. indirect selling expenses. Otherwise, respondent has an incentive to report all U.S. selling expenses as indirect in order to obtain a greater offset. Therefore, respondent requests that the Department treat the entire amount of indirect selling expenses as direct selling expenses.

DOC Position

Duty. We are unsure why respondent refers to double-counting of duty charges. Respondent has always reported U.S. duty as unique movement charge in its database. We verified duty charges in the same context as airfreight

charges, specific to shipments of roses and reported as a movement charge. Respondent has not reported U.S. duty in its importer's indirect selling expenses. In the preliminary determination, we used the highest reported duty as BIA for any ESP sale with no duty reported (as all FOB Miami sales must have applicable duty charges). We noted in our verification report that respondent failed to report duty for several transactions. Therefore, as BIA, we are using the average positive duty and airfreight charges for purposes of the final determination.

Brokerage. In its first submissions, respondent reported U.S. brokerage as a fixed-fee per airway bill on ESP sales. Respondent then stated shortly before the preliminary determination that it had double-counted these costs by also including brokerage charges in its reported indirect selling expenses. At the preliminary determination, we stated that it was proper to report brokerage as a movement charge, and that, since we could not easily remove brokerage from indirect selling expenses, we subtracted both the charges reported in the database as movement expenses, and the total reported indirect selling expenses.

At verification, respondent demonstrated to the Department that the brokerage costs incurred by the importer's staff acting as respondent's in-house broker, include not only the importer's brokerage fees, but also the personnel and other costs of the respondent's U.S. subsidiary. Therefore, company officials maintained that the total costs associated with brokerage should be reported as a subset of indirect selling expenses.

We determined that the manner in which total brokerage charges are incurred and recorded in the respondent's accounting system, and the difficulty of re-allocation to rose sales, are circumstances under which their inclusion in the related importer's indirect selling expenses was warranted.

U.S. Inland Freight Expenses

During verification, respondent identified the freight charges for local transportation included in the importer's overhead expenses. Consequently, we removed them from indirect selling expenses and treated them as a movement expense. We also deducted from the reported indirect selling the freight expense amount.

Comment 56

Petitioner argues that expenses related to hurricane damage, amortization, legal fees and depreciation should not be excluded from respondent's G&A expenses. Petitioner believes that these expenses are costs of selling in the U.S. market. Petitioner further maintains, that because these expenses were classified as G&A in the ordinary accounting records of the importer, there is no basis to treat these charges as extraordinary items. Petitioner further maintains that certain depreciation expenses which were not reported as indirect selling expenses, should be included since they relate to the sale and distribution of subject merchandise.

Respondent maintains that these expenses were properly excluded from the reported indirect selling expenses because these expenses are unrelated to selling expenses.

DOC Position

During verification, we established that the related importer did not report to the Department certain overhead expenses. According to respondent, these expenses were not reported since they are unrelated to rose sales and were properly classified as G&A expenses.

We agree with petitioner that the G&A expenses excluded from the reported indirect selling expenses should be included in the indirect selling expenses because importer's function, as a related subsidiary, is the sale and distribution of the subject merchandise. Since the expenses respondent excluded from indirect selling were not reported to the Department and since there is not sufficient information on the record to show how these expenses can be allocated to the importer's rose sales related to respondent, the Department used BIA to account for these unreported expenses. The Department added the ratio of the unreported overhead expense amount to the importer's total sales value to the indirect selling expense ratio used in the calculation of respondent's indirect selling expenses.

Comment 57

The petitioner maintains that expenses related to the computer system department should be allocated among farms based on the sales value or volume. The petitioner further argues that allocating these expenses over the number of farms would disguise the higher costs involved in making more entries for farms with higher sales volume. The petitioner, therefore, suggests that the computer system department expenses be prorated based on either the sales value or the number of boxes shipped to the respondent's U.S. subsidiary.

According to the respondent, sales value and volume are irrelevant to this allocation because it takes approximately the same amount of time to prepare a growers report, regardless of the number of transactions.

DOC Position

At verification we examined the records of the respondent's U.S. subsidiary and found no evidence that the method used to allocate entry processing expenses was not reflective of the company's record-keeping system.

We disagree with the petitioner that the expenses related to the computer system department should be allocated based on the sales value or volume of each farm. Moreover, fixed costs for salaries, computer supplies, and maintenance are incurred regardless of the volume or value of transactions entered into the computer system. Therefore, the Department found the allocation of these expenses based on the number of farms to be appropriate.

Comment 58

At verification, company officials of the respondent's U.S. subsidiary explained that its grower department incurred expenses for soliciting new suppliers of roses. We established that the U.S. subsidiary did not allocate any of these expenses to the rose sales of its related company. The respondent argues, however, that, as these expenses relate to soliciting new suppliers of roses, and the U.S. subsidiary's supply from the respondent is already guaranteed by their relationship, the U.S. subsidiary's grower department expenses were properly not allocated to the respondent.

The petitioner argues that, in the absence of any evidence showing that such expenses were not applicable to the respondent, the full amount of grower department expenses should be allocated to the respondent based on a sales prorated basis.

DOC Position

At verification we found no evidence that respondent's U.S. subsidiary's grower department expenses were applicable to the respondent. Therefore, the Department did not allocate any expenses of the U.S. subsidiary's grower department to the respondent's rose sales in the U.S. market.

Comment 59

Respondent contends that it appropriately capitalized certain severance payments for its submission and amortized those payments over a two-year period. Respondent states that the purpose of the payment was to encourage employees to switch to a new

severance pay system that could benefit the company in future periods.

Petitioner argues that the severance paid during December 1993 should be expended in the POI, according to the company's normal accounting practice. Petitioner states that severance by nature is based on past service, not future services. Petitioner argues that it is unclear whether the expenditures will produce any future cost reductions. Additionally, there is no basis to conclude that respondent's normal accounting practice distorts actual costs.

DOC Position

We agree with respondent. In order to benefit from the amendment to the Colombian labor laws, respondent paid its employees a voluntary bonus that was equivalent to approximately two years of severance payments under the old system. The adoption of the amendment by a company is voluntary. The purpose of the amendment is to generate lower monthly severance provisions in the future. For the submission, respondent amortized this bonus over the period it will take to recover the bonus expense through cost savings. Since the bonus is, in effect, a prepayment of future severance cost, we made no adjustment. The Department also recognizes that U.S. GAAP allows delayed recognition of post-employment benefits. Thus, charges for post-employment are not recognized as incurred but are recognized systematically over future periods. Therefore, no adjustment was made for purposes of the final determination.

Comment 60

Petitioner states that the accounting adjustments made during the POI should be included in COP and CV. Petitioner argues that respondent has not demonstrated that the adjustments were not, in fact, actual expenditures during the POI. The petitioner also states that there is no basis on which to depart from the company's audited financial statements.

Respondent argues that when calculating constructed value, the Department may include only those costs which would ordinarily permit production in the ordinary course of business. 19 U.S.C. 1677b(e)(1)(a). Respondent contends that the Department should not automatically rely upon a company's accounting records, but instead, should determine whether the amount represents a cost of production properly attributable to the POI, and if it does not, it should be excluded. The respondent argues that a company may properly treat a cost for the purposes of calculating constructed value in a manner that differs from the treatment of those costs in the company's books. Respondent argues that is appropriate when the treatment in the books does not represent actual production costs and cites the final determination of sales at less than fair value:

Ferrosilicon From Venezuela, 58 FR 27522, 27527 (1993).

DOC Position

We agree with the respondent. At verification, respondent demonstrated that the year end adjustments were not current production costs. Instead, these entries related to costs of the following year. Respondent provided data to support that the adjustments were reversed within the first few business days of 1994, and, thus, were properly recorded in 1994 production costs.

Comment 61

Petitioner contends that the 1992 maintenance costs capitalized in the company's books and the amortized during 1993 should not be excluded from reported costs. The petitioner claims that there is no basis on which to depart from the company's audited financial statements.

Respondent states that these capitalized maintenance costs did not relate to the production of subject merchandise during the POI. Respondent states that if the Department were to include 1992 maintenance expenses in 1993 cost, then to be consistent, some maintenance expenses incurred in 1993 should be reclassified as 1994 costs.

DOC Position

We agree with respondent. By capturing all of respondent's 1993 operating expenses we have accounted for all rose production costs. Accordingly, no adjustment is deemed necessary.

Comment 62

Respondent states that the Department should not include in CV the costs of a certain business investment that is wholly unrelated to the production of roses in Colombia. Respondent notes that the income generated by this investment was similarly excluded from the submission.

DOC Position

We agree with respondent. Since this investment is not related to the production of roses, we did not include the income or expenses associated with it.

Grupo Bojaca

Comment 63

Respondent confirmed that it properly reported G&A expenses. Thus, respondent claims there is no longer any factual basis upon which to continue the G&A adjustment made in the preliminary determination.

DOC Position

We agree with the respondent. The Department adjusted the G&A amounts at the preliminary determination because respondent had failed to provide a timely reconciliation of the reported amounts. Subsequently, the Department reconciled these costs at verification. No discrepancies concerning this expense were noted at verification, therefore, adjustments are no longer necessary.

Comment 64

The petitioner claims that offsets to financial expenses were overstated by profits on investment sales, income from previous years, and other income. The petitioner states that only income directly related to the short-term interest expenses is permitted as an offset to interest expense. Moreover, the petitioner states that respondent failed to show that the claimed income is related to short-term investments. Such support is required before income can be used as an offset to interest expenses. The petitioner states that income from prior years or from insurance claims does not relate to current short-term interest costs.

Respondent claims that its reported financial income is appropriately treated as an offset to financial expenses. The respondent also argues that the Department should not recalculate its reported per unit net interest expense so as to allocate total company-wide interest expense to roses. The respondent states that this is a generic problem (for all companies) that stems from the Department's misunderstanding of how the CV tables were developed in the *Fresh Cut Flowers* cases. The respondent states that the Department should utilize the per unit net interest expense as calculated in the CV tables submitted.

DOC Position

We agree, in part, with both the petitioner and the respondent. The miscellaneous income amounts allocable to roses were reclassified to G&A expense. Only interest earned on short-term investments of working capital was used to offset financial expense. As to the error in the CV table,

we have corrected this problem in our final calculations. (*See* Comment 11).

Comment 65

Respondent claims the Department's verification report overstates the errors with respect to its credit period calculation and U.S. credit expenses, and that only two customers were affected. For those two customers, respondent used an incorrect box charge in the denominator of its credit expense calculation. Respondent claims that increasing the monthly average sales by a given amount results in no change to the credit periods for these two customers. Respondent also states that the days outstanding will not change as a result of volume changes as suggested in the verification report.

The petitioner states that verification disclosed errors in the calculation of U.S. credit days that should be amended.

DOC Position

While we noted errors in respondent's calculation of U.S. credit days for two customers, the effect of these errors does not change the actual number of days outstanding from that reported. Thus, we have used respondent's reported days outstanding.

Comment 66

The petitioner states that discounts are price adjustments or direct selling expenses, not financial costs. Accordingly, such costs should be segregated and separately deducted as direct selling expenses. The petitioner states that to the extent that these costs cannot be separated from true financial costs, the entire amount should be treated as direct selling expenses.

The respondent states that there is no way to segregate cash discounts from the related importer's financial expenses, nor is there any reason to do so. Respondent notes that because the basis of its FMV is CV, it does not matter whether these costs are reported as indirect or direct selling expenses.

DOC Position

We agree with the petitioner that discounts should be segregated and treated as a price adjustment. Accordingly, we have segregated discounts from indirect selling expenses and made an adjustment to USP for these discounts. Thus, we have adjusted indirect selling expenses for the discounts and have also included financial expenses in the indirect selling expenses.

Grupo Clavecol

Comment 67

The petitioner maintains that respondent's air freight charges were improperly allocated by flower weight. The petitioner maintains that the use of a universal kg/box weight to allocate freight charges is inaccurate because box weight will vary significantly depending on the type of flowers packed in the same size box. The petitioner maintains that the per-rose weight calculated from the reported average is not realistic based on the petitioner's comparison of the per-rose weight to weights of other flowers shipped by respondent. The petitioner maintains that the Department should use the ratio of total sales of roses to total sales of all flowers to allocate total air freight charges to roses.

The respondent maintains its allocation is reasonable because, although the number of flowers per box varies, boxes of flowers are generally treated as weighing approximately the same regardless of the type of flowers contained in the box. The respondent states that the petitioner overstates the variance in flower weights by failing to recognize that units for flowers such as alstromeria are for bunches, not stems. Moreover, the petitioner's proposed methodology appears to result in a lower air freight charge for roses than the currently reported allocation.

DOC Position

We disagree with the petitioner. The petitioner did not distinguish between numbers of stems and numbers of bunches for alstromeria, which changes the relationship between weight and flower type considerably. The result of respondent's calculation was an average weight per rose stem which is neither unreasonable nor improbable. We note that the respondent's basic weight-driven methodology had been on the record since June. The petitioner never raised this issue, nor did the Department instruct respondent to change its reporting prior to verification. Verification is not intended to collect new data nor to design new methodology. The petitioner neglects to mention that the air freight bills to respondent's U.S. subsidiary cover the subsidiary's FOB Miami sales both to the United States and to Canada, so that the higher rate would, in fairness, apply to the average for both U.S. and Canadian FOB Miami sales. Accordingly, we have continued to use the data as reported and verified by the Department.

Comment 68

The petitioner maintains that respondent did not sufficiently substantiate that the expenses recorded under a certain account code pertain only to sales made to third countries. The petitioner argues that respondent presented no documentation at verification to support its claim. Moreover, the petitioner argues that, if third-country sales represent a given percent of total exports, it is not credible that third-country selling expenses equal a larger percent of total selling expenses reported.

Respondent maintains that the documentation examined at verification showed that the categories of expenses included in its response were specifically related to third country sales. The respondent states that these expenses, by their nature, do not apply to U.S. sales.

DOC Position

We disagree with the petitioner. The Department's verifiers were provided with both explanations and basic documentation to show that certain Bogota export expenses did not pertain to U.S. sales. In terms of the general difference in levels of cost, respondent's sales channels in third-country markets are not the same as its operations in the United States, therefore, it is not improbable that different costs are incurred for processing third country sales.

Comment 69

The petitioner argues that respondent should have separately reported U.S. inland freight costs rather than include them with indirect selling expenses.

The respondent maintains that the Department issued a letter on August 10, 1994, expressly stating that it was not necessary to segregate inland freight charges from U.S. indirect selling expenses.

DOC Position

Early in the investigation, counsel for numerous Colombian respondents, including respondent, explained that, because of the nature of their companies' record-keeping, certain expenses could not readily be broken out in the requested computer format. In our August 10, 1994, letter, we allowed the respondents to report various expenses, including brokerage and handling, inland freight, and warehousing, as components of aggregate indirect selling expenses, instead of breaking these out as separate costs to be reported as movement expenses. The letter was conditional, however, as it stated that, ''if at

verification the Department discovers information which is contrary to your August 9, 1994, letter, we may reconsider these decisions.'' At verification, we examined the records which contained freight cost entries for truck services and for van expenses. The various related accounts, such as maintenance and depreciation, apply to any and all use of the U.S. subsidiary's vehicles. Company officials showed us that these general expenses apply universally to trucking and van services. Verification confirmed that there was not a reasonable method available for disaggregating the costs for U.S. inland freight for roses.

Therefore, we have kept U.S. inland freight charges as a component of the U.S. subsidiary's indirect selling expenses in keeping with the terms outlined in the Department's August 10, 1994, letter.

Comment 70

The petitioner argues that certain advertising expenses should be treated as direct selling expenses and should only be allocated to U.S. sales. The petitioner states that since the advertising was published in the magazine *Florists Review*, the readers of the magazine would be customers of respondent's customers, that is, the florists who buy from the wholesalers who purchase roses from respondent.

The respondent maintains that, first, these are insignificant expenses and their treatment as direct selling expenses would make little impact on the dumping calculation. Second, the respondent maintains that the U.S. subsidiary's advertising is seen by wholesale customers who also read Florists Review. Third, respondent argues that this magazine is also distributed in Canada; thus if direct selling expenses are warranted, Canadian sales as well as U.S. sales should be affected.

DOC Position

We disagree with the petitioner. We re-examined the sample documentation in verification Exhibit 14C. The evidence shows that the advertising touts the U.S. subsidiary's reliability as a supplier. Nowhere does the advertising speak to retail shops; no admonitions exist for retail florists to ask their suppliers to look for the U.S. subsidiary's products. As the advertising is aimed at respondent's customer, and not to that customer's customers, we have made no change in treating advertising as reported indirect selling expenses.

Comment 71

The petitioner alleges that purchase prices should be adjusted to reflect unreported wire transfer changes. The petitioner cites the verification report, which states that one U.S. customer paid respondent by wire transfer and deducted the wire transfer cost from the amount paid to respondent. Respondent did not report this reduction to the U.S. proceeds from the sale in question. The petitioner maintains that since there is no indication on the record as to how many U.S. transactions involved wire transfer charges or how many U.S. customers deducted wire transfer charges from the amount returned to respondent, the Department should deduct the verified single discrepancy, as a percentage of gross price, from all purchase price sales to all customers.

The respondent argues that since this issue only involved one of six purchase price sales examined at verification, only the single sale in question should be modified for the discrepancy.

DOC Position

Wire transfer is one of several common methods of payment by respondent's customers. The unreported deduction from invoice price for wire transfer charges appeared in one of six sales examined at verification. As BIA, we have reduced all sales to that purchase-price customer whose payment showed this omission, by the corresponding percentage of the unreported reduction to U.S. price.

Comment 72

The respondent maintains that the Department should use the reported interest rate to calculate imputed credit on U.S. sales. The respondent maintains that it submitted proper documentation to the Department for the reported rate and states that its U.S. subsidiary did not have loans during the POI.

DOC Position

We agree with the respondent. Respondent did provide requested documentation for its reported interest rate on September 22, 1994. Respondent was fully prepared to review its history of borrowing during the POI; the verification team elected not to review the materials, thus no negative inference is warranted.

Comment 73

The respondent maintains that the Department should use the expenses reported as adjustments to U.S. price.

DOC Position

We agree, in part, with the respondent. We are using the data submitted to the Department by respondent on December 7, 1994, which includes corrections based on the company's verification. We have also made minor adjustments, such as that for missing U.S. wire transfer charges.

Comment 74

Respondent contends that its submitted G&A expense was properly allocated based on cost of manufacturing (COM). Additionally, respondent states that all of its business activities related to growing flowers.

Petitioner alleges that G&A was allocated on the basis of variable costs, and asserts that G&A should be allocated based on cultivated area because fixed costs associated with business activities not concerned with subject merchandise, *i.e.*, a cattle ranch, are very different than flowers.

DOC Position

The Department considers respondent's allocation of G&A based on COM to be a reasonable methodology. Additionally, there is no information on the record indicating that the respondent was involved in activities other than growing flowers during the POI.

Comment 75

Petitioner claims that rose production costs were understated because all production costs were allocated on an equal basis, by area, to field crops (containing gypsophilia. flowers) and flowers grown in greenhouses.

Respondent states that its gypsophilia. crop was grown in greenhouses and that petitioner provided no evidence to support its accusation that gypsophilia. was a field crop. Therefore, the Department should reject petitioner's claim.

DOC Position

There is no compelling evidence to support petitioner's claim that respondent's production cost allocation methodology distorts rose production costs. Accordingly, we made no adjustment for purposes of the final determination.

Grupo Floramerica

Comment 76

The respondent argues that all of its selling expenses were incurred by Floramerica, S.A. and Flores Las Palmas. The respondent states that its central office incurs the majority of the selling expenses and records them in Floramerica, S.A.'s books. The respondent explains that the central office provides selling and support functions for all products at all the

Group's farms. However, the respondent contends that it is impossible to separate selling expenses on a farm-specific basis. The respondent maintains that its allocation methodology for its indirect selling expenses is correct because the total selling expenses to be allocated reflect selling support functions for all the Group's products. The respondent argues that it would have overstated its total selling expenses allocable to roses if, as the Department suggests, it would have used sales revenue from only Floramerica, S.A. and Flores Las Palmas.

The petitioner argues that indirect selling expenses incurred in Colombia should be allocated only over sales by Floramerica S.A. and Las Palmas. The petitioner maintains that the verification exhibit supporting the Department's analysis of respondent's indirect selling expenses expressly states ''Total Selling Expenses (Floramerica and Palmas)'' allocated by revenue of all farms in the Group. The petitioner further argues that the cost verification report does not indicate that selling expenses were limited to Floramerica, S.A. and Flores Las Palmas.

DOC Position

We agree with respondent. Respondent allocated the indirect selling expenses of Floramerica, S.A. and Flores Las Palmas to roses by determining the percentage of rose sales as a proportion of sales of all products. Because respondent allocated Floramerica S.A.'s and Flores Las Palmas' indirect selling expenses by the revenue of all related farms in the Group, its calculation understated the indirect selling expenses of Floramerica, S.A. and Flores Las Palmas. However, because Floramerica S.A. provides sales support for the entire group, if we allocated the indirect selling expenses by only Floramerica S.A.'s and Flores Las Palmas' revenue, we would overstate their indirect selling expenses. Therefore, as there is no way to reallocate these expenses, we have accepted the respondent's methodology as reasonable.

Comment 77

Petitioner argues that only income relating directly to respondent's short-term assets is permitted as an offset to interest expense.

Respondent contends that the Department should continue to allow its total financial income to offset its financial expenses. Respondent maintains that the cost verification report does not conclude that only a portion of its financial income should be allowed to offset its financial expenses. According to the respondent, the cost verification report states that financial income generated from short-term investments of working capital are generally allowed as an offset to financial expenses. Respondent states that its financial income was verified without discrepancy.

DOC Position

Respondent reduced financial expenses for interest income earned from certain assets. These assets had maturities ranging from one to five years. The Department generally only allows financing expense to be offset by short-term investments of working capital (*see, Final Result of Antidumping Administrative Review: Gray Portland Cement from Mexico*, 58 FR 47256 (September 8, 1993)). The maturities of these assets are all greater than one year and therefore cannot be considered short-term in nature. Therefore, we disallowed the portion of interest income earned from the long term assets.

Comment 78

Petitioner argues that fixed costs should be included in respondent's packing expenses.

Respondent states that the Department verified its packing calculation and its allocation methodology and found no discrepancies. Therefore, respondent contends that the Department should use the verified packing expense data and not the BIA amount used in the preliminary determination. Furthermore, respondent argues that the Department should include fixed overhead in the packing costs. Respondent further argues that, if the Department decides these costs are not packing costs, these costs must be classified as indirect selling expenses.

DOC Position

We agree with respondent that certain fixed overhead costs are part of the packing operation. Accordingly, we have included fixed overhead related to the packing operation in the packing cost for purposes of the final determination.

Comment 79

Respondent contends that the Department should make year-end accounting adjustments which were noted at verification. Respondent states that it reported the higher unadjusted costs to the Department instead of its actual costs, as adjusted at year-end. Respondent states that the most significant of the year-end accounting adjustments relates to an over-accrual of pension liability. Respondent states that it reported the higher, unadjusted costs rather than the actual labor costs incurred during the POI.

Petitioner agrees with the respondent that the Department should make year-end labor adjustments.

DOC Position

We agree with respondent that its submitted cost data did not include the year-end accounting adjustments. Accordingly, for purposes of the final determination, we corrected the submitted costs to include all 1993 year-end adjustments.

Comment 80

Respondent argues that the Department should accept its reported and verified G&A calculation, which was based on cost of goods sold, for purposes of the final determination.

Petitioner agrees with respondent that the Department's normal practice is to allocate G&A on the basis of cost of goods sold. Petitioner states that there is no apparent reason to depart from the normal methodology unless adequate cost data for each respondent is not available.

DOC Position

We agree with both parties. The Department considers respondent's allocation of interest expense and G&A based on cost of goods sold to be reasonable.

Grupo Intercontinental

Comment 81

Respondent argues the Department should base its final determination on the information submitted by it and verified by the Department. It states that, while the Department used BIA as a basis for its preliminary determination, the Department noted in that determination that it would conduct verification and base its final determination on the verified information if these respondents submitted ''adequate and timely'' responses to supplemental requests for information.

Respondent states that it filed adequate and timely responses to supplemental requests regarding both sales and cost and the Department made no further requests for additional information or clarification. Moreover, respondent states that the Department conducted a detailed verification of the information submitted and found only a few minor discrepancies in revenue and charges.

The petitioner states that respondent's U.S. sales listing is unreliable and

should be rejected in favor of BIA. The petitioner argues that respondent revised its U.S. sales listing twice prior to verification and that the Department found additional discrepancies with regard to volume and value of sales at verification. The petitioner also states that revenue and charges were incorrectly reported and identifies discrepancies with respect to box charges, air freight, return credits (*see* Comment 82).

DOC Position

We agree with the respondent. While it was not possible to use the information submitted by respondent for the preliminary determination, the respondent has submitted, and we have accepted, revised information which was examined at verification. Although the information examined at verification contained some discrepancies, these matters were not so significant as to demonstrate that respondent's U.S. sales listing, as a whole or in part, was unreliable.

With respect to the quantity and value of respondent's U.S. sales, the discrepancies found were relatively minor. We find no reason to use BIA for respondent's U.S. sales response.

Comment 82

The petitioner states that at least box charges should be assigned a best information value equal to the lowest amount reported for any sale during the POI or denied altogether as an adjustment. It also states that since air freight charges are misallocated by the number of stems rather than by weight, the Department should identify the highest per-stem charge for any month and apply that charge to all U.S. sales as ''best information.''

The respondent states that the box charge issue noted by the petitioner affected only two customers, and was insignificant. The respondent also states that the petitioner has confused total box charges per observation with the box charge per box. The respondent states that the petitioner's allegations with regard to its reporting of return credits are similarly groundless and reflect a lack of understanding of how the grower reports record return credits. The respondent states that nothing on the record or in the sales verification report supports the contention that its reporting of return credits to the Department was in any way unreliable.

Respondent also rebuts the petitioner's assertion that air freight charges were misallocated since it is charged for air freight on the grower's reports by the number of stems and that is, therefore, the only reliable basis it has for making this allocation. Respondent adds that the grower's reports do indicate air freight attributable to non-roses (*i.e.*, gypsophilia, and alstromeria) and those amounts were deducted from the total allocated to roses. The respondent also states that such information was fully verified by the Department and no discrepancies were reported.

DOC Position

With regard to the question of return credits and air freight and box charges, the calculation methodologies were reasonable and consistent with the information available from grower's reports. With regard to return credits, in particular, we noted at verification that the respondent was able to link return credits to sales. Moreover, we accepted the respondent's explanation that in some instances customers claim credits in excess of the gross value of the merchandise and that in such instances, the respondent does not make customers adjust for such excessive credit claims. We have therefore, made no adjustments to the data that respondent submitted regarding these issues.

Comment 83

Respondent states that for purposes of its final determination the Department should accept its minor clarification in its reporting of Colombian Flower Council Contributions. The respondent states that although certain discrepancies with respect to fees paid to the Colombian Flower Council were found at verification, the respondent provided information at verification clarifying these discrepancies.

DOC Position

While certain discrepancies were discovered by the Department during verification, we verified the revised data and have used this data in our margin calculations.

Comment 84

Petitioner states that respondent excluded various nonoperating expenses from its submitted rose production costs and that the excluded items should be added back as current production costs. Petitioner asserts that absent any evidence to establish that such costs were misclassified in respondent's normal accounting records, there is no basis to exclude these costs.

Respondent maintains that it properly excluded many of the non-operating expenses noted by the petitioner since these expenses did not relate to the current production or sale of roses. Respondent further states that it excluded other expenses listed by the petitioner because the expenses related to rose production costs from years prior to the POI.

DOC Position

We agree with petitioner in part. The unreported general income and expense items relating to Intercontinental as a whole were included in our cost calculations. Certain income and expense items identified during the current year relate to prior periods. Similarly, income and expense items relating to the current year are not identified until a future point in time, thus generating an offsetting effect. Therefore, we adjusted the submitted G&A costs to include the unreported income and expense items.

Comment 85

Respondent states that G&A expenses were properly allocated according to the number of employees assigned to each flower type. Respondent states that the number of workers, by flower type, is a reasonable surrogate for cost of goods sold when allocating G&A, since labor is the largest expense in flower production.

Petitioner states that G&A should be reallocated based on cost of goods sold or area in production, rather than number of employees. Corporate salaries for the finance department, legal department, and the like have no relationship to the number of employees by flower type. Such costs are generally allocated according to cost of goods sold.

DOC Position

We agree with the petitioner and have reallocated G&A using production area. During verification, it was found that the number of employees assigned to each flower type was an estimate and could not be verified.

Grupo Papagayo

Comment 86

The petitioner maintains that one of the exhibits (Exhibit Indirect-3) collected during respondent's verification shows that certain expenses for rents and leases incurred by the sales department, and other expenses related to photocopies and building administration were not included in the reported indirect selling expenses. The petitioner argues that since the expenses are related to the Sales Department, they should be included in respondent's indirect selling expenses.

Respondent states that the expenses contested by the petitioner are G&A, not selling expenses, and were reported to

and accepted by the Department as G&A expenses for CV purposes.

DOC Position

We disagree with the petitioner that the contested expenses were related to sales only. Based on our examination of respondent's records, we determined that the expenses in question were properly classified as G&A expenses. The exhibit to which the petitioner refers reflects an account that contains entries related to sales as well as to general expenses. At verification, we examined each entry and supporting documentation made for a specific month and found that the entries classified as G&A expenses were not specifically related to sales. Therefore, the Department did not include the expenses to which the petitioner referred in the calculation of respondent's indirect selling expenses.

Comment 87

The petitioner maintains that the proportion of expenses related to export documentation allocated to rose sales in the U.S. market is disproportionate to the ratio of the U.S. market sales to sales in other markets. Therefore, the petitioner requests that the Department reallocate these expenses based on the ratio of U.S. market sales to the sales in other markets.

Respondent states that the petitioner is mistaken because the portion of the verification report to which petitioner refers describes the proportion of the export document charges attributed to various categories, not just roses.

DOC Position

The petitioner's interpretation of the verification report is incorrect. First, the petitioner interpreted the proportion of expenses related to opening and closing registros for all markets as related only to U.S. sales. Second, the petitioner erroneously interpreted the ratio of rose sales to sales of all products as the ratio of U.S. rose sales to sales of roses in all countries. Therefore, the ratios cited by the petitioner bear no relationship to each other.

It should be noted, however, that the expenses related to opening and closing registros were not reported to the Department. It was not possible to allocate these expenses to rose sales for each market because company officials did not provide sufficient information necessary for such an allocation. Therefore, the Department included the total amount of expenses related to opening and closing registros in the calculation of respondent's indirect selling expenses allocated to rose sales in the U.S. market.

Comment 88

The petitioner argues that the expenses related to the Colombian Grower's Association (CGA) discovered during verification in respondent's accounting records should be included as indirect selling expenses. According to the petitioner, there is no evidence concerning the functions or activities of the CGA that justifies treating these expenses as G&A rather than selling expenses.

The respondent maintains that the fees paid to the CGA should not be treated as indirect selling expenses because CGA does not provide sales-related services.

DOC Position

The Colombian Grower's Association is the same type of entity as Asocolflores. During verification, the Department found no evidence that this association was involved in selling activities. Therefore, the Department did not include these fees as part of respondent's selling expenses.

Comment 89

The petitioner argues that the documentation collected during verification shows that certain expenses were not captured in the total indirect selling expense amount.

The respondent maintains that the expenses in question are related to fees paid to the Colombian Flower Council, which were reported to the Department as direct selling expenses.

DOC Position

We agree with the respondent that the expenses to which the petitioner refers are related to the fees paid to the Colombian Flower Council. Two of these expenses to which the petitioner referred related to sales to U.S. customers, the third was for a U.K. customer. At verification, we established that the U.S. expenses were included in the reported direct selling expenses. Therefore, the Department did not include these expenses in the calculation of respondent's indirect selling expenses.

Comment 90

The respondent states that during the POI, it used a U.S. operator for all international calls, which were paid for in dollars. According to the respondent, the cost of those international calls was properly allocated to all international sales, since the calls were made to customers throughout the world.

The petitioner argues that respondent's claim that the telephone expenses incurred in U.S. dollars were related to telephone calls to all countries cannot be supported. The petitioner requests that the Department treat the entire amount of U.S. dollar denominated telephone charges as selling expenses related to U.S. sales only.

DOC Position

During verification we found no evidence that the cost of respondent's international phone calls was related to telephone calls made to the United States alone. Therefore, the Department used the portion of telephone expenses the respondent allocated to U.S. sales in the calculation of indirect selling expenses.

Comment 91

Petitioner stated that drastic pruning and resting should not be characterized as preproduction costs. Petitioner maintains that pruning is typically performed annually by all rose producers. Petitioner notes that these costs are analogous to general maintenance costs on a piece of equipment. Accordingly, the costs related to the drastic pruning and resting should be expended as incurred, unless respondent's methodology can be tied to the normal accounting practices of the company.

Respondent maintains that the cost of drastic pruning and resting are incurred every thirty months, at the end of each production cycle. Respondent further notes that these costs are normally capitalized on the books and records of the company. Respondent believes that these costs are properly characterized as preproduction costs since they occur prior to the start of rose production. Respondent notes that the reported capitalized pruning and resting costs were verified by the Department.

DOC Position

The drastic pruning/resting crop adjustment methodology is used by respondent in its normal course of business, and is in accordance with GAAP of Colombia. At verification, the reported costs were reconciled to the company's financial records. We further noted at verification that respondent manages its plants to produce roses in thirty month production cycles. At the end of each production cycle, respondent cuts down the rose plants and starts the process over again. Therefore, we believe that it is appropriate for the respondent to capitalize the costs incurred in preparing for the next production cycle and to amortize such costs over the thirty month cycle. The Department considers the drastic pruning/resting methodology to be reasonable and

therefore, no adjustment is deemed necessary.

Comment 92

Respondent notes that the Department is correct in suggesting that the write-off of bad debt is a selling expense. However, the write-off of the bad debt is a selling expense related to sales in 1990 and 1991, not to sales during the POI. Therefore, the amount of the write-off should be excluded from finance expense and should not be included in the calculation of POI per unit costs.

Petitioner argues that the bad debt write-off during the POI should be included as a selling expense for the POI. The petitioner notes that, in the future respondent will experience bad debt expense related to sales occurring in the POI, which would not be included in POI costs. Thus, the current write-off of past sales is the best evidence of the proper amount to be deducted currently.

DOC Position

The Department agrees with petitioner. We consider bad debt, by its very nature, to be an indirect selling expense since, under generally accepted accounting principles, bad debt is recovered over time by future price increases (*see, Brass Sheet and Strip from France*, 52 FR 6, 812 (DOC 1987)). Bad debts should be recognized when the expense is recognized.

Comment 93

Respondent maintains that the unreported general expense items do not relate to rose production during the POI. Respondent asserts that they are corrections to sales and production expenses from previous years. Therefore, these costs are not properly attributable to the POI. Respondent contends that if the Department decides to include these costs, then it also should offset them by the related income amounts.

Petitioner argues that there is no basis to offset G&A expense items and year-end accounting adjustments with income unrelated to rose production. According to petitioner there is no evidence to support respondents' claim for this offset.

DOC Position

The unreported general income and expense items relate to the general activities of respondent as a whole. Certain income and expense items identified during the current year relate to prior periods. Similarly income and expense items relating to the current year are not being identified until a future point in time, thus generating an offsetting effect. Therefore, we consider it reasonable to include the financial statement general income and expense items in the G&A calculation.

Grupo Prisma

Comment 94

The respondent claims that each of the deficiencies identified by the Department as a reason for BIA in the preliminary determination are now moot because the problems have been resolved in its September 23, 1994, submission and at verification. Respondent states that the Department thoroughly verified the completeness of its U.S. and home market sales reporting, the accuracy of the adjustments and the methodology used to consolidate sales of different companies of the group. Respondent claims the Department identified only minor data entry errors in its sales report. Accordingly, respondent alleges there no longer exists any sustainable basis for finding that its response contains significant deficiencies or for applying a BIA rate.

Respondent states that the ''significant findings'' noted in the sales verification report all involve minor data entry errors that were corrected and verified. Respondent states that none of the errors detracts from the overall integrity of the questionnaire response. Specifically, respondent indicates that, whether or not Argicola el Faro (one of the respondent's growers) was omitted from the corporate flow chart is inconsequential as Agricola el Faro's products never separately enter the United States. Regarding quantity changes noted in the verification report, respondent notes that these were isolated and the result of input errors. Finally, respondent states that the reporting error to one customer has no impact on its overall numbers and that the error worked against it and respondent states that the Department should use the corrected sales listing it prepared for this customer. The respondent states that the petitioner's entire argument for basing the respondent's final determination on BIA is based on a misrepresentation of a sentence in a draft version of the verification report that the Department has admitted was mistakenly issued to the petitioner.

Finally, respondent alleges that the petitioner took a statement out of context from the verification report to suggest that the respondent's indirect selling expenses are not accurate. Respondent notes that, as its unrelated importer had prepared the noted worksheet based on its own documents and records, the information could not be verified by using its documents. Moreover, respondent states that even disregarding the importer's worksheets and using its own sales values did not change the indirect selling expense that it reported. Thus, respondent claims there is no basis for the petitioner's charge that its response is unreliable.

The petitioner states that, based upon the results of verification, respondent's U.S. sales listing is unreliable and should be rejected in favor of BIA. The petitioner states that the Department found numerous discrepancies during verification including discrepancies in respondent's June sales affecting volume and value and, sometimes, both. The petitioner also notes that, with respect to U.S. indirect selling expenses, the verification report states that, ''importer's worksheets were not maintained as we were unable to verify much of the data.'' Therefore, the petitioner claims that the U.S. sales listing is not credible. The petitioner suggests that the June sales for which the Department checked 100 percent of the transactions might be relied upon as the basis for calculating margins for that month. Without similarly exhaustive revisions to the sales listing for other months, however, the petitioner claims the errors are too numerous to disregard. The petitioner, thus, suggests that BIA be used for purposes of the final determination.

DOC Position

Although we used BIA for respondent for purposes of the preliminary determination, we conducted a complete and thorough verification of its responses. The discrepancies noted at verification were of the type normally discovered at verification. We find no reason to reject the respondent's response in *to to* and have used it for purposes of the final determination.

Comment 95

The petitioner alleges that respondent has not included any salaries in its indirect selling expenses and references an account for the respondent that includes G&A expenses for the company.

Respondent states that, as its unrelated importers in Miami function as its sales force, it does not have a sales force in Miami. Respondent notes that the account the petitioner mentions includes all expenses for general services, including all administrative and general management salaries. Thus, respondent notes that the expenses were properly reported as G&A expenses in the CV tables. Respondent claims it included all relevant salaries in its

calculation of indirect selling expenses for the people in Bogota that take care of preparing export documentation and coordinating shipments. Respondent claims that it has no other salaries related to sales to the United States.

DOC Position

We agree with the respondent. The petitioner's allegation is unfounded and we have not adjusted respondent's indirect selling expenses to include salaries.

Grupo Sabana

Comment 96

The petitioner alleges that respondent did not consistently record oil and gas charges associated with rose transportation and that for certain months these charges were reported under other accounts. The petitioner requests that we use, as BIA, the highest cost per unit in a given POI month.

The respondent maintains that it reported all of its freight costs and that the Department verified these costs during both the cost and sales verifications. The respondent also contends that if there are any additional expenses, they are captured in the reported CV. The respondent maintains that there is no justification to resort to BIA since its reported inland freight expenses tie directly into its accounting records. Finally, the respondent notes that if the Department deemed it necessary to include freight expenses in the freight calculation, the amounts involved are insignificant, and the adjustment has no impact.

DOC Position

We agree with the respondent. We established that the reported oil and gas expense plus an amount included on the worksheet sum to the expense reported in the respondent's financial statement. We further note that during the cost verification not every month had an oil and gas expense, but these omissions were due to accounting practices that are generally accepted accounting principles in Colombia. Therefore, we have accepted the respondent's freight expense allocation methodology.

Comment 97

The petitioner argues that respondent should not be using the prime rate when other U.S. importers that had POI short-term borrowings did not obtain such a rate. The petitioner maintains that we should increase the respondent's interest rate to be consistent with the commercial rate actually charged to other importers during the POI.

The respondent notes that there is no record evidence that it used an inappropriate U.S. interest rate. Therefore, the respondent maintains that the Department should accept its U.S. credit expense calculation.

DOC Position

We agree in part with the petitioner. In situations where there are no borrowings in the currency of the sales made, we have used external information about the cost of borrowings in a particular currency (*see Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-weld Pipe Fittings from Thailand*, 59 FR 50568, October 4, 1994). We are using an average of the interest rates reported by those respondents that had actual U.S. borrowings during the POI. We consider this to be the best estimate of the U.S. dollar borrowing rates for those respondents that had no short-term borrowings, as it is based on the actual expenses of other respondents.

Comment 98

The petitioner argues that the Department should increase the number of days used in the respondent's expense calculation because the respondent's methodology only accounts for merchandise which has already reached U.S. inventory and does not take into account the time during which merchandise is transported from the factory to Miami.

The respondent maintains that in the inventory day calculation the Department should not increase the number of days by the amount the petitioner is proposing because that amount represents the time it takes to transport the product to Toronto and Montreal and not to Miami.

DOC Position

We agree in part with the petitioner. Our verification report at exhibit 24 demonstrates that the respondent did not take into account the time necessary to transport the merchandise from the factory to Miami. Therefore, we added to the number of inventory days an amount which other respondents claimed was necessary to transport product from the factory to Miami.

Comment 99

Respondent argues that the Department should allocate certain production costs based on the number of beds under cultivation and not based on the hectares under cultivation, because all of its recordkeeping is based on beds.

Petitioner contends that allocation by beds is less precise because it does not account for walkways, common areas, and there is no evidence that subject and nonsubject beds are the same size.

DOC Position

The Department agrees with the respondent. During verification, the Department reviewed the beds under cultivation allocation methodology and found it to be a reasonable approach. The methodology is used in respondent's normal course of business, and has been accepted in the *Fresh Cut Flower* reviews.

Comment 100

The petitioner argues that cull revenue should not be offset against production costs. Petitioner argues that a certain expense is diminished to the extent of the cull revenue.

Respondent claims that cull revenue must be included in the calculation of CV. Respondent argues that there is no justification for disallowing the credit to production costs because of where the revenues are deposited.

DOC Position

We agree in part with the petitioner. The Department allowed only the rose cull revenue recorded in respondent's normal accounting records to offset production costs. All claimed cull revenue which had not been appropriately deposited into respondent's bank account has been excluded. The cull revenue that is not deposited into respondent's bank account is neither recorded nor reported in any of respondent's accounting records.

Grupo Sagaro

Comment 101

The petitioner argues that the discovery of unreported stems that were sold to one customer in June 1993 undermines the reliability of respondent's submission. The petitioner also contends that the verification of February 1993 sales did not include this customer. For these reasons, the petitioner argues that the Department should not rely on respondent's data in these circumstances. If the Department used respondent's data the petitioner argues that it should increase the quantities sold to all customers in June proportionately or, at the least, increase the quantity sold to this customer.

The respondent argues that there are no grounds for the petitioner's assertion that a minor discrepancy in its sales reporting to one customer undermines its response. The respondent maintains that this discrepancy accounts for an

insignificant amount of total U.S. sales. The respondent explains that the error resulted when the customer in question changed the format for reporting inventories on its growers report. June was the first month of this change and is the month in which the error occurred. The respondent maintains that the error was limited to this one customer in a single month. Finally, the respondent states that the Department verified that it had no sales to this customer in February.

DOC Position

We disagree with the petitioner's assertion that respondent's response is unreliable. At verification, we reviewed the volume and value of respondent's U.S. sales and found only minor discrepancies, none of which would render its response unreliable. Therefore, based on the growers report for this customer, we have revised respondent's sales listing to reflect the quantity and value of sales to this customer during June.

Comment 102

The petitioner maintains that credit costs should be revised to reflect only the short-term interest rate as provided in the sales verification report.

Respondent maintains that it does not object to the use of the interest rate the Department calculated at verification for home market credit expenses.

DOC Position

We agree with both parties and have applied the verified home market short-term interest rate in the calculation of home market credit expenses.

Comment 103

The respondent argues that we should use its reported credit period in its home market credit expense calculation.

DOC Position

We disagree with the respondent. At verification, we found credit periods longer and shorter then the period reported by respondent. Therefore, we used the average of the credit periods found at verification, because that average most closely reflects the actual home market credit periods.

Comment 104

The petitioner argues that unreported direct selling expenses incurred on sales to one customer should be allocated to only subject merchandise and not over all other sales. The petitioner states that the Department should increase this customer's direct selling expenses accordingly and provided a calculation of this expense.

DOC Position

We agree with petitioner's argument but not its suggested calculation formula. We have increased this customer's direct selling expense by the unreported amount and allocated the total of these expenses to the rose sales of this customer.

Comment 105

The petitioner argues that foreign inland freight charges on U.S. sales should be increased to reflect charges allocated per stem sold, as per the verification report. Additionally, the petitioner requests that wire transfer fees be corrected as per the verification report.

DOC Position

Respondent made these corrections on its December 7, 1994, sales listing. We accepted these changes and used them for the final determination.

Comment 106

Respondent argues that the Department should permit it to capitalize and amortize certain costs, which would only benefit production in future years, but were expensed for financial statement purposes.

Petitioner argues that items expensed in respondent's accounting records in the normal course of business should not be capitalized and amortized for purposes of the response. Petitioner argues that there is no basis on the record, and no verification exhibit, to support the claim that such items should be capitalized or to indicate a particular useful life for each of the identified costs.

DOC Position

We agree with respondent that these costs benefit future years. Accordingly, it is reasonable for these assets to be capitalized in the year of acquisition. *See* also Comment 19.

Comment 107

Respondent argues that the cost of its worm project should not be included in CV. Respondent argues that, although it is theoretically possible for the fertilizer generated from the worm project to be used on rose plants, the project was not started with that intention and it has not analyzed whether the fertilizer would be appropriate for use in rose beds. Additionally, respondent notes that the fertilizer from the worm project was not used for the production of roses during the period of investigation.

Petitioner claims that costs incurred with respect to the worm culture project for soil preparation should be allocated to rose production. Petitioner argues that this type of research and development (''R&D'') expense should be expensed in the current period. Petitioner states that, since the respondent characterizes the project as related to rose production, there is no basis to exclude such expenses from the current period.

DOC Position

We agree with petitioner that the worm culture project costs should be categorized as R&D. There is no conclusive evidence that this project is R&D specific to either rose production or any other type of production activity. Therefore, we consider the worm culture project to be related to general R&D and, accordingly, have included its costs in the G&A expense calculation.

Comment 108

Petitioner argues that the Department should reject the allocation of costs to non-subject merchandise as it was not substantiated on the record or during verification. Specifically, petitioner argues that verification exhibits 1, 9, and 15 show conflicting results for cultivation area of the different flowers grown by respondent. Absent evidence to support the basic allocation of costs, the entire cost response should be rejected.

Respondent argues that its allocation of costs by area under cultivation is fully supported in the record. Respondent believes that petitioner's complaint that the percentage areas in respondent's cost exhibits CV–9 and CV–15 do not agree is without merit. Respondent notes that those exhibits support the allocations of different classes of expenses, relate to different corporate entities, and the percentage areas should not agree. Additionally, respondent notes that cost exhibit CV–1 does not agree with either of the other two exhibits because of a printing error which was addressed at verification.

DOC Position

We agree with respondent that its allocation of costs between subject and non-subject merchandise based on area under cultivation is fully supported by data on the record. Therefore, no adjustment is deemed necessary for purposes of the final determination.

Grupo Tropicales

Comment 109

The petitioner notes that, because the Department found discrepancies in respondent's return credits for five preselected U.S. sales, respondent's return credit reporting is unreliable. The petitioner asserts that return credits were overstated, either by volume or

value, thus increasing U.S. price. The petitioner suggests that we reject respondent's return credits claim entirely or make a downward adjustment to all U.S. return credits equal to the excess amount reported for certain observations.

The respondent claims that the record does not support taking the action requested by the petitioner with respect to its return credits. Respondent describes its return credit reporting methodology in its brief and notes that its methodology would increase its dumping margin. The respondent states that the Department should not disregard or adjust return credit volumes and then not adjust return credit values or vice versa. Moreover, the respondent claims that there is no reason to make any changes to its return credits based on the minor discrepancies noted in the verification report.

DOC Position

We agree with the petitioner that respondent's return credits did not verify as reported. We have made a downward adjustment to the sales on which return credits were reported. This adjustment equals the overall average error as a percentage of gross unit price for the months which we have information.

Comment 110

The petitioner claims that respondent's credit days should not be adjusted to account for outstanding return credit claims. The petitioner states that verification is not the appropriate time for submitting a new and substantially revised claim.

Respondent states that it revised its calculation of days outstanding in its imputed credit calculation to account for return credits and revised certain payment and balance figures. The respondent states that ignoring return credits leads to an ever increasing balance for receivables, a growing portion of which simply are not receivables. The respondent claims that the Department should use the days outstanding as revised and verified.

DOC Position

We agree with the respondent. At verification, respondent presented revised U.S. credit days outstanding to account for outstanding return credit claims. This constituted a minor change to the data they reported. Consistent with our treatment of minor changes noted at verification, we have used respondent's revised U.S. credit days.

Comment 111

The petitioner notes that respondent did not claim to have paid commissions on its ESP sales to its related U.S. importer. However, the related importer's grower's reports indicate that commissions were paid. Thus, the petitioner states that these commissions should be deducted from ESP.

The respondent states that no commission was reported because the two companies were related during the period in which the sales took place and, thus, the commissions should not be deducted on the ESP sales.

DOC Position

Although respondent indeed pays its related U.S. importer an arm's length commission, we have ignored this commission for the reasons stated in General Issue Comment 7.

Comment 112

Respondent claims that we should accept the minor revisions, corrections and clarifications presented prior to verification and discovered during verification. Specifically, respondent states that the Department should accept a correction to the calculation of foreign inland freight that was verified. Also, respondent states that none of the discrepancies noted at verification had a significant impact on the margin calculations.

DOC Position

We agree with the respondent that the discrepancies noted at verification were minor in nature and we have, thus, used respondent's verified data.

Rosex Group

Comment 113

The petitioner maintains that, according to the sales verification report, the respondent did not deduct return credits for one customer in the month of February in its sales listing. Therefore, the petitioner argues that, as BIA, the Department should make a deduction from all of the respondent's U.S. prices equal to the percentage of the unreported return credits to revenue for February.

The respondent argues that the error which affected one return credit for one customer for one month of the POI was insignificant. The respondent contends that small errors are inevitable when such a large amount of information is required. The respondent contends that the petitioner's claim that the entire sales listing is unreliable or its suggestion that, if the sales listing is accepted, every U.S. sales price should be reduced by the percentage of the error, is unsupportable.

DOC Position

We disagree with the petitioner that, due to an error in month of the POI for one customer, we should reject the respondent's entire response and base its final margin on BIA. At verification we found that this discrepancy was limited to one customer and no discrepancies were found for other customers. However, because the respondent did not report any quality credits for this customer, we have based the return credits for this customer on BIA. We reduced the respondent's U.S. gross unit price in each month of the POI by the percentage of returned credits to sales during the month examined at verification.

Comment 114

The petitioner contends that respondent failed to allocate foreign inland freight costs to stems sold because it included ''stems dumped'' in its formula for allocating freight costs. Therefore, the petitioner maintains that the freight costs per box decreased when the respondent sold fewer boxes than it shipped in a given month. The petitioner argues that, as the Department found in its verification report, the respondent should have increased its cost per box shipped in order to allocate its total foreign inland freight to roses sold. The petitioner further argues that the Department should, as BIA, apply foreign inland freight charges equal to the highest calculated charge according to the respondent's methodology, or to the amount calculated on shipments in which the total number of stems shipped equalled the number of stems sold.

The respondent argues that it reported all of its foreign inland freight expenses during the POI. Therefore, the respondent contends, it did not underreport or overreport its foreign inland freight in any way. The respondent maintains that its allocation methodology is more accurate than directly allocating monthly costs to monthly sales. The respondent contends that its methodology correlates freight expenses with sales that were not made in the same month that the expenses were incurred. The respondent states that this methodology prevents the distortional effects of unadjusted monthly per unit foreign inland freight costs. The respondent maintains that the Department should not penalize it for reporting its foreign inland freight in the most accurate manner possible and should accept its methodology. The respondent argues, alternatively, that

the Department can use the verified figures and calculate a simple monthly foreign inland freight expense.

DOC Position

We agree with the petitioner that the respondent's methodology did not account for roses which were shipped but not sold for certain customers. At verification, we found that when customers did not sell the same amount of roses which were shipped in a given month, the allocation of foreign inland freight expenses were either overstated or understated. However, we agree that the respondent attempted to provide the most specific inland freight expenses possible and that the total yearly amount of inland freight was verified. Since the Department decided to average USP by all roses combined, we have recalculated the respondent's foreign inland freight expenses for all customers with this expense using a yearly allocation without regard to stem length or rose type.

Comment 115

The petitioner states that, according to the sales verification report, the methodology the respondent used to report air freight for one of its customers is flawed. Therefore, the petitioner argues that, as BIA, the Department should deduct the highest per stem air freight charge calculated for any sale to that customer.

The respondent contends that the Department should correct the minor discrepancy in its air freight calculation and use the verified figures. The respondent argues that a discrepancy of this limited magnitude should not result in BIA as the petitioner argues.

DOC Position

We agree with the respondent that air freight expenses for those months that we verified (i.e., May and October) should be applied because this discrepancy was limited to one customer. Because we found that the respondent overstated and understated this expense in the months reviewed at verification we have added the aggregated amount of the understated air freight expenses for this customer for the verified months and applied that amount to all other months during the POI for this customer.

Comment 116

The petitioner maintains that the respondent offset interest expenses with ''other'' financial income. Since the Department found that the respondent had no short-term interest income, the petitioner argues the ''other'' financial income should be disregarded and that the interest expense cannot be offset for purposes of the final determination.

The respondent argues that the absence of short-term interest income has no relevance as to whether the respondent had other financial income relating to production that should be included in CV. The respondent maintains that the Department verified its financial income and noted no discrepancies. Additionally, respondent states that other financial income, not short-term interest income, was used as an offset to interest expense and the fact that it was not short-term interest income is not relevant.

DOC Position

We agree with the petitioner. We disregarded other financial income as an offset to interest expense because it is Department practice to only allow an offset to interest expense for interest income generated from short-term investments of working capital. Since the other financial income was not generated from short-term investments of working capital, the offset was disallowed.

Comment 117

The respondent argues that the Department should use credit periods based on actual payment data which was verified by the Department with only minor discrepancies.

DOC Position

We agree with the respondent and have used the verified information.

Comment 118

The respondent argues that the Department should use its verified indirect selling expense information for purposes of the final determination.

DOC Position

We agree with the respondent and have used the verified information.

Suspension of Liquidation

In accordance with section 735(c)(4)(A) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of all entries of fresh cut roses from Colombia, as defined in the ''Scope of Investigation'' section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The U.S. Customs Service shall require a cash deposit or the posting of a bond equal to the estimated margins amount by which the FMV of the subject merchandise exceeds the USP, as shown below. The weighted-average dumping margins are as follows:

Manufacturer/Producer/Exporter	Margin percent
Agrorosas	0.00
Grupo Papagayo (and its related farms Agricola Papagayo, Inversiones Calypso S.A., Omni Flora Farms Inc., and Perci S.A.)	3.02
Flores Mocari S.A. (and its related farms Cultivos Miramonte and Devor Colombia)	3.26
Grupo Sabana (and its related farms Flore de la Sabana S.A. and Roselandia S.A.)	5.80
Flores la Frangancia	3.31
Grupo Benilda (and its related farms Agricola La Maria S.A., Agricola La Celestina Ltda., and Agricola Benilda Ltda.)	5.07
Grupo Clavecol (and its related farms Claveles Colombianos Ltda., Sun Flowers Ltda., Fantasia Flowers Ltda., Splendid Flowers Ltda.)	1.56
Floramerica Group (and its related farms Floramerica S.A. (Santa Lucia and Santa Barbara Farms), Jardines de Colombia Ltda., Flores Las Palmas Ltda., Cultivos del Caribe Ltda., Jardines del Valle Ltda., and Cultivos San Nocolas Ltda.)	4.95
Rosex (and its related farms Rosex Ltda. (La Esquina and Paraiso Farms), Induflora Ltda., and Rosas Sausalito Ltda.)	3.06
Grupo Sagaro (and its related farms Flores Sagaro S.A. and Las Flores S.A.)	0.00
Grupo Tropicales (and its related farms Rosas Colombianas Ltda., Happy Candy Ltda., Mercedes Ltda., and Flores Tropicales Ltda.)	0.00
Grupo Prisma (and its related farms Flores del Campo Ltda., Flores Prisma S.A., Flores Acuarela S.A., Flores el Pincel S.A., Rosas del Colombia Ltda., Agropecuaria Cuernavaca Ltda.)	1.29
Grupo Bojaca (and its related farms Agricola Bojaca Ltda., Universal Flowers, and Plantas y Flores Tropicales Ltda. (Tropifora))	22.14
Andes Group (and its related farms Flores Horizonte, Cultivos Buenavista, Flores de los Andes, and Inversiones Penasblancas)	0.00
Caicedo Group (and its related farms Agrobosque, Productos el Rosal S.A., Productos el Zorro S.A., Exportaciones Bochia S.A.—Flora Ltda., Flores del Cauca, Aranjuez S.A., Andalucia S.A., Inverfloral S.A., and Great America Bouquet)	36.04
Grupo Intercontinental (and its related farms Flora Intercontinental and Flores Aguablanca)	11.94
All Others	6.41

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our

determination. As our final determination is affirmative, the ITC will determine whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry, within 45 days. If the ITC determines that material injury or threat of material injury does not exist, the proceedings will be terminated and all securities posted as a result of the suspension of liquidation will be refunded or cancelled. However, if the ITC determines that such injury does exist, we will issue an antidumping duty order directing Customs officers to assess an antidumping duty on fresh cut roses from Colombia entered or withdrawn from warehouse, for consumption on or after the date of the suspension of liquidation.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (APO) in these investigations of their responsibility covering the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 735(d) of the Act and 19 CFR 353.20(a)(4).

Dated: January 26, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–2608 Filed 2–3–95; 8:45 am]

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[A–331–801]

Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 6, 1995.

FOR FURTHER INFORMATION CONTACT: James Terpstra or Pamela Ward, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–3965 or (202) 482–1174, respectively.

Final Determination

We determine that fresh cut roses (roses) from Ecuador are being, or are likely to be, sold in the United States at less than fair value, as provided in 19 U.S.C. 1673d. The estimated margins are shown in the ''Suspension of Liquidation'' section of this notice.

Case History

Since the notice of preliminary determination on September 13, 1994 (59 FR 48299, September 20, 1994), the following events have occurred.

In September and October, the Department of Commerce (the Department) received responses to the Department's supplemental questionnaires.

On September 20 and 27, 1994, Arbusta, Florinsa and Guanguilqui Agro Industrial S.A. (Guaisa), three of the mandatory respondents, and Inversiones Floricola S.A. (Floricola), the fourth mandatory respondent, respectively, requested a postponement of the final determination. On September 28, 1994, the Department agreed to postpone the final determination until January 26, 1995 (59 FR 50725; October 5, 1994).

On September 20, 1994, Arbusta made allegations of clerical errors in the calculation of Arbusta's preliminary margin. In addition, Florinsa requested that the Department reconsider its preliminary determination and assign it a less punitive BIA rate.

On September 28, 1994, the Department received a new sales listing from Arbusta. This was returned to Arbusta on September 30, 1994, as untimely in accordance with 19 C.F.R. 353.31(a).

On September 29 and 30, 1994, the Department received requests for a public hearing from respondents, petitioners, and the Government of Ecuador.

On September 30, 1994, petitioner submitted comments on the Department's verification outline.

On October 3, 1994, White and Case entered a Notice of Appearance on behalf of Denmar, S.A. an interested party. Denmar S.A. and its related companies are, collectively, a producer, exporter and importer of fresh cut roses from Ecuador.

Department personnel conducted sales and cost verifications of respondents' data from October 3, 1994, through November 11, 1994, in Quito, Ecuador; the Netherlands; Miami, Florida; New York, New York; and Los Angeles, California.

On October 14, 1994, the Department received a notice of appearance from Klayman & Associates on behalf of the Government of Ecuador and received comments on the preliminary determination on October 17, 1994.

On November 23, 1994, the Department received new computer tapes from Floricola.

In December the Department issued its verification reports.

The Department received general issues case briefs on December 2 and 12, 1994. The Department received general issues rebuttal briefs on December 16 and 19, 1994. The Department received company specific case briefs on December 23 and 30, 1994. The Department received company specific rebuttal briefs on January 5, 1995.

On January 3, 1995, the Department received new computer tapes from Guaisa, Florinsa and Arbusta.

On January 5, 1995, Klayman & Associates withdrew its appearance on behalf of the Government of Ecuador. On the same day, Kay, Scholer, Fierman, Hays & Handler entered an appearance on behalf of the Government of Ecuador.

A public hearing was held on January 6, 1995.

Scope of Investigation

The products covered by this investigation are fresh cut roses, including sweethearts or miniatures, intermediates, and hybrid teas, whether imported as individual blooms (stems) or in bouquets or bunches. Loose rose foliage (greens), loose rose petals and detached buds are excluded from the scope of these investigations. Roses are classifiable under subheadings 0603.10.6010 and 0603.10.6090 of the *Harmonized Tariff Schedule of the United States (HTSUS).* The *HTSUS* subheadings are provided for convenience and customs purposes. The written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is January 1, 1993, through December 31, 1993. *See* the April 14, 1994, Memorandum from the Team to Richard W. Moreland.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and to the Department's regulations are in reference to the provisions as they existed on December 31, 1994.

Best Information Available

We have determined, in accordance with 19 U.S.C. 1677e(c), that the use of best information available (BIA) is appropriate for sales of the subject merchandise by Florinsa. We have found that Florinsa's original and deficiency questionnaire responses were unusable for the final determination because they contained significant deficiencies and could not be verified. *See* the January 19, 1995, Memorandum from the Team to Barbara Stafford. These deficiencies were so substantial that it was not possible for the

Department to calculate an antidumping duty margin for Florinsa.

In assigning BIA, the Department applies a two-tier methodology based on the degree of respondent's cooperation. In the first tier, the Department normally assigns higher margins (*i.e.*, margins based on more adverse assumptions) for those respondents which did not cooperate in an investigation or which otherwise impede the proceeding. If a respondent is deemed as non-cooperative, the Department bases the final margin for the relevant class or kind of merchandise on the higher of: (1) The highest margin in the petition or (2) the highest calculated margin of any respondent within the country that supplied adequate responses for the relevant class or kind of merchandise.

In the second tier, the Department assigns lower margins to those respondents who substantially cooperate in an investigation. These margins are based on the higher of: (1) The highest calculated margin for any respondent within that country that supplied adequate information for the relevant class or kind of merchandise or (2) the average of the margins in the petition. *See, e.g., Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 FR 18992 (May 3, 1989).

The Department's two-tiered methodology for assigning BIA has been upheld by the U.S. Court of Appeals for the Federal Circuit. See *Allied-Signal Aerospace Co.* v. *United States*, 996 F.2d 1185 (Fed. Cir. 1993); see also *Krupp Stahl AG* v. *United States*, 822 F. Supp. 789 (CIT 1993).

Florinsa responded to our requests for information and we find that it has been substantially cooperative for purposes of this final determination. Accordingly, we used as second-tier BIA for this respondent, the average of the margins contained in the petition, which is 84.72 percent. This margin is higher than the highest margin calculated for any respondent in this investigation.

Exclusion of BIA Rate From Calculation of the ''All Others'' Rate

The Department has determined to exclude from the calculation of the ''All Others'' rate the BIA rate assessed to Florinsa. The Department's general practice is to include in its calculation of an ''all others'' rate all investigated firms that receive affirmative margins, including any firm whose margin is based upon BIA. However, where appropriate, the Department has departed from its general practice in prior cases and excluded BIA-based margins from the calculation of the ''all others'' rate. *See, e.g., Silicomanganese from Brazil*, 59 FR 55432 (November 7, 1994); *Sweaters from Hong Kong* (*Sweaters*), 55 FR 30733 (July 27, 1990) (affirmed by the CIT in *National Knitwear*).

For example, in *Sweaters*, an association of Hong Kong knitting manufacturers and an association of U.S. textile and apparel importers argued that firms not representative of the industry should not be included in the calculation of the ''all others'' rate, particularly where a firm had received a BIA-based margin. The Department agreed that departure from its general practice was warranted because it would have been ''inappropriate'' to include The BIA-based rate in the calculation of the ''all others'' rate given ''(1) The enormous disparity between the three verified rates and the highest rate in the petition, *i.e.*, approximately 20 times greater; (2) [the Department's] examination of only the top 30 percent of total quota holdings, and (3) the small number of firms investigated, *i.e.*, four from a potential pool of over 300.'' 55 FR 30737–38 (comment 3).

Like *Sweaters*, the unusual circumstances present in the instant proceedings, particularly the Department's need to limit the number of firms investigated, call into question the representativeness of investigated firms with respect to noninvestigated firms. Specifically,

(1) The Department only examined companies which produced the top 40 percent of the total export volume, as opposed to the normal 60 percent minimum proscribed by the Department's regulations (19 C.F.R. 353.42(b));

(2) the Department examined only a relatively small number of firms, *i.e.*, four out of a potential pool of 20 firms in Ecuador;

(3) the Department was unable, due to administrative burdens, to accept voluntary respondents and exclusion requests.

Based on these circumstances and in light of the *Sweaters* precedent, it is reasonable to exclude Florinsa's BIA-based margin from the calculation of the ''all others'' rate. *See* comment 21, *infra* for petitioner and respondent arguments. *See also* the January 13, 1995, Memorandum from the Office of Chief Counsel to Susan G. Esserman.

Such or Similar Comparisons

We have determined that all roses covered by this investigation comprise two categories of ''such or similar'' merchandise: culls and export-quality roses. None of the respondents reported sales of culls in the United States. Therefore, no comparisons in this such or similar category were made. Regarding export quality roses, we compared United States Price (USP) to constructed value (CV).

Fair Value Comparisons

To determine whether sales of roses from Ecuador to the United States were made at less than fair value, we compared the USP to the CV for all non-BIA respondents, as specified in the ''United States Price'' and ''Foreign Market Value'' sections of this notice.

United States Price

For all U.S. prices, we calculated USP using weighted-average monthly prices by rose type, where the appropriate data were available. *See* Comments 4 and 5 below.

During the POI, respondents paid commissions to related parties in the United States. However, we made no adjustment for these payments. Instead, we subtracted the actual indirect selling expenses incurred by the related party in the United States because we determined that to account for both commissions and actual expenses would be distortive. *See* Comment 7 below.

For sales by Arbusta and Guaisa, we based USP on purchase price, in accordance with 19 U.S.C. 1677a(b), when the subject merchandise was sold to unrelated purchasers in the United States prior to importation and when exporter's sales price (ESP) methodology was not otherwise indicated.

In addition, for Arbusta, Guaisa, and Floricola, where sales to the first unrelated purchaser took place after importation into the United States, we also based USP on ESP, in accordance with 19 U.S.C 1677a(c).

Each of the respondents classified credits related to quality problems with the merchandise as warranty expenses. However, because these quality-related credits functioned as price reductions, we reclassified them as such.

We made company-specific adjustments, as follows:

1. Arbusta

For Arbusta, we calculated purchase price based on packed F.O.B. Quito prices to unrelated customers. In accordance with 19 U.S.C. 1677a(d)(2)(A), we made deductions, where appropriate, for foreign inland freight and for quality-related credits and for export taxes imposed by the Government of Ecuador, in accordance with 19 U.S.C. 1677a(d)(2)(B). We also deducted DHL expenses for one customer.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for quality-related credits, foreign inland freight, export taxes, air freight, U.S. customs duties, U.S. brokerage and handling expenses and U.S. inland freight. We also made deductions for direct selling expenses inlcuding credit and for U.S. and Ecuadorian indirect selling expenses, including inventory carrying costs.

Regarding export taxes, Arbusta did not report these taxes in its sales listing. Because the taxes are included in the USP, we, therefore, calculated them based on the formula given in Arbusta's response.

2. Floricola

For Floricola, we calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for quality-related credits, including billing and other credits, foreign inland freight, export taxes imposed by the government of Ecuador, air freight, U.S. customs duties, U.S. inland freight and credit expenses. We also made deductions for U.S., Panamanian, and Ecuadorian indirect selling expenses, including brokerage and handling expenses and inventory carrying costs.

Floricola failed to report inventory carrying costs on their ESP sales. Accordingly, as in the preliminary determination, we calculated these costs using an inventory carrying period of seven days.

3. Guaisa

For Guaisa, we calculated purchase price based on packed F.O.B. Quito prices to unrelated customers. We made deductions, where appropriate, for quality-related credits and foreign inland freight. We also made deductions for export taxes imposed by the Government of Ecuador.

We calculated ESP based on packed prices to unrelated customers in the United States. We made deductions, where appropriate, for quality-related credits, foreign inland freight, U.S. inland freight, air freight, U.S. customs duties, U.S. brokerage and handling expenses, employee commissions, credit expenses and indirect selling expenses including warehousing expenses inventory carrying costs.

Guaisa reported that it earned a rebate, as well as six free round-trip tickets, from its air freight carrier based on its volume of sales to the United States during the POI. We deducted the rebate from Guaisa's air freight calculations. However, because the airline tickets were not a direct reduction in the air freight paid, we did not reduce Guaisa's air freight.

Foreign Market Value

We based FMV on CV for all producers. For those respondents with viable third country markets, we rejected sales to these markets. *See* Comment 6 below. The remaining respondent had no viable home or third country market. We calculated CV on a rose type basis, where the appropriate data were available. *See* comment 5 below.

In order to determine whether there were sufficient sales of fresh cut roses in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of export quality roses to the volume of third country sales of export quality roses in accordance with 19 U.S.C. 1677b(a)(1)(A). Based on this comparison, we determined that none of the three non-BIA respondents had viable home markets.

In the preliminary determination, we based FMV for two of the three non-BIA respondents on third country sales. However, as set forth in Comment 6 below, we determined third country prices as an inappropriate basis for FMV in this investigation. Therefore, we calculated FMV based on CV for all non-BIA companies, in accordance with 19 U.S.C. 1677b(e).

Third Country Versus Constructed Value

The Department has determined that FMV should be based on CV rather than third country. For a full discussion of this issue, see Comment 6 below.

Constructed Value

We also made specific adjustments to each respondent's submitted COP and CV data as described below:

1. Arbusta

For Arbusta, we: (1) Adjusted amortization and depreciation expenses for the effects of Ecuadorian inflation; (2) corrected G&A to reflect income generated from the sale of humus; (3) reclassified the FONIN tax to selling expenses; (4) removed foreign exchange gains unrelated to production from the reported financial expenses.

2. Floricola

For Floricola, we: (1) Adjusted amortization and depreciation expenses for the effects of Ecuadorian inflation; (2) corrected a computational error in the amortization expense; (3) reclassified the FONIN tax to selling expenses; (4) included the amortization of pre-operating expenses and corrected the over accrual of other expenses in G&A; (5) reclassified insurance reimbursements, gain on sale of fixed assets and other expenses from financial expense to G&A; (6) revised the cost of goods sold used as the allocation basis for G&A; and, (7) decreased short term financial income for foreign exchange gains from sales transactions.

3. Guaisa

For Guaisa, we: (1) Adjusted amortization and depreciation expenses for the effects of Ecuadorian inflation; (2) corrected the allocation methodology for certain expenses to a relative area planted methodology; (3) included the write-off of greenhouses; (4) adjusted costs for two clerical errors; (5) increased financial expenses to include all interest paid; (6) increased financial expenses for translation losses on loans denominated on foreign currencies; (7) increased the quantity of export quality roses to reflect normal production levels.

In order to calculate FMV, we made company-specific adjustments as described below:

1. Arbusta

For CV to purchase price comparisons, we made circumstance of sale adjustments for direct selling expenses including credit expenses.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses including credit expenses. We also deducted from CV indirect selling expenses, including inventory carrying costs up to the amount of indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

2. Floricola

For CV to ESP comparisons, we made deductions, where appropriate for direct selling expenses. We also deducted the indirect selling expenses up to the amount of the indirect selling expenses incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

3. Guaisa

For CV to purchase price comparisons, we made circumstance of sale adjustments for direct selling expenses including credit expenses and export taxes.

For CV to ESP comparisons, we made deductions, where appropriate, for direct selling expenses including credit expenses and export taxes. We also deducted from CV the indirect selling expenses, including inventory carrying costs and warehousing expenses up to the amount of indirect selling expenses

incurred on U.S. sales, in accordance with 19 CFR 353.56(b)(2).

Currency Conversion

Because certified exchange rates for Ecuador were unavailable from the Federal Reserve, we made currency conversions for expenses denominated in Ecuadorian sucres based on the official monthly exchange rates in effect on the dates of the U.S. sales as published by the International Monetary Fund.

Verification

As provided in 19 U.S.C. 1677e(b), Department personnel conducted sales and cost verifications of respondents' data from October 3, 1994, through November 11, 1994, in Quito, Ecuador; the Netherlands; Miami, Florida; New York, New York; and Los Angeles, California.

Critical Circumstances

In the petition, petitioner alleged that ''critical circumstances'' exist with respect to importation of roses. However, we did not initiate a critical circumstances investigation. Because roses are extremely perishable, it is not possible to accumulate an inventory of roses in order to evade a potential antidumping duty order. Therefore, we determined that an allegation that critical circumstances exist is without merit. *See* the September 12, 1994, Concurrence Memorandum.

Interested Party Comments

The Department conducted LTFV investigations in *Fresh Cut Roses from Ecuador* and *Fresh Cut Roses from Colombia* concurrently. We determined that certain decisions should be applied consistently across both cases, even though parties may have placed different arguments on the record as these decisions concerned issues common to both cases. All decision memoranda pertaining to general issues and corresponding supporting documentation are on the record for both investigations. The information discussed in the General Comments section of this notice is all non-proprietary. Therefore, unless otherwise stated, the General Comments apply to both investigations, even if parties in one investigation did not specifically address the issue.

General Comments

Petitioner and respondents raised comments pertaining to the concordance, the treatment of Difmer adjustments, the aggregation of third country markets, and annual and monthly averaging of FMV. These comments were rendered moot by the Department's decision to base FMV on CV. *See* Comment 6 below.

Comments Pertaining to Scope

Comment 1: Roses in Bouquets

Respondents assert that roses in bouquets should not be included within the scope of the investigation for four reasons: (1) There is no legal basis for the Department to include within the scope of the investigation only a component part contained in imported finished merchandise (*i.e.*, the roses within the bouquet); (2) bouquets are not within the same class or kind of merchandise as roses according to the criteria set out in *Diversified Products* v. *United States*, 572 F. Supp. 883, 889 (CIT 1983) (*Diversified Products*); (3) the Department lacks the authority to expand the investigation to include bouquets; and (4) petitioner does not represent producers of bouquets or producers of ''roses in bouquets.'' Respondents have supplied an analysis of the information in these investigations as applied to *Diversified Products*.

Petitioner requests that the Department continue to include roses in bouquets within the scope of its investigation. Petitioner states that since the description of bouquets is found in the petition, the Department's and ITC's preliminary determinations are dispositive as to the scope of the investigation, and an analysis under *Diversified Products* is unnecessary, although petitioner supplied such an analysis. Petitioner states that the scope description in the petition covers all fresh cut roses, whether imported as individual blooms (stems) or in bouquets or bunches. Also, petitioner claims to represent growers producing mixed bouquets of fresh cut flowers, and hence has standing to file a petition covering bouquets.

Petitioner maintains that any antidumping duty order issued in this investigation will be substantially undermined if foreign rose producers/exporters can circumvent the order by importing bouquets of fresh cut roses covered by the order. Petitioner states that it would be absurd for the Department to permit respondents to combine merchandise subject to the order to achieve a final product outside the scope of the order.

DOC Position

Roses, including roses in bouquets, are within the scope of the investigation and constitute a single class or kind of merchandise. Because the scope covers only the roses in bouquets, not the bouquets themselves, respondents' arguments that bouquets constitute a separate class or kind are inapposite. Therefore, a *Diversified Products* analysis is not required. The Department's conclusion that all roses, whether or not imported as individual stems or in bouquets or bunches, constitute a single class or kind of merchandise is consistent with its determination in *Flowers*. *See Flowers*, 59 FR 15159, 15162–4 (March 31, 1994) (final results of 4th admin. review).

The packaging and presentation of roses in bunches and bouquets do not transform the roses into merchandise outside the scope of the order. *See Final Determination of Sales at Less Than Fair Value; Red Raspberries from Canada*, 50 FR 19768, 19771 (May 10, 1985). Nor is the rose transformed into a new article by virtue of being bunched or placed in a bouquet. Notably, Customs disaggregates bouquets, requiring separate reporting and collection of duties on individual flower stems regardless of how they are imported. As a result, Customs, in this case, will collect duty deposits only on individual rose stems incorporated in bouquets, not the bouquets themselves.

Respondents argue that there is no legal basis for the Department to include within the scope of an investigation only a component part of imported finished merchandise, *i.e.*, the roses within the bouquet. As discussed above, consistent with Customs, the Department is not treating bouquets as a distinct finished product.

Respondents' argument that the Department cannot expand the investigation to include bouquets, also can be dismissed. A review of the descriptions contained in the petition and the Department's and ITC preliminary determinations reveals quite clearly that what is covered by this investigation is all fresh cut roses, regardless of the form in which they were imported. Specifically, the petition covers ''all fresh cut roses, *whether imported as individual blooms (stems) or in bouquets or bunches,* as provided in HTSUS 0603.10.60.'' Petition at 8 (emphasis added). HTSUS 0603.10.60 covers

> Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh * * *
>
> 0603.10.60 Roses:
>
> 10 Sweetheart
>
> 90 Other

Furthermore, the scope of this investigation unequivocally states that

> The products covered by this investigation are fresh cut roses, including sweethearts or miniatures, intermediates, and hybrid teas,

whether imported as individual blooms (stems) or in bouquets or bunches.

Preliminary Determination of Sales at Less Than Fair Value, 59 FR 48285 (Colombia), 59 FR 48294 (Ecuador) (emphasis added). Finally, in its preliminary determination, the ITC found that ''the plain language of Commerce's scope description in these investigations demonstrates that the merchandise subject to investigation covers the roses *in* the bouquets only,'' and not the bouquets themselves. ITC Pub. No. 2766 at 9 (March 1994). Neither the Department nor the petitioner has ever attempted to include the bouquets themselves, nor any of the other types of flowers which comprise a bouquet, within the scope of this investigation. The plain language of the Department's scope description demonstrates that the merchandise subject to investigation covers the roses *in* the bouquets only and does not expressly state that the bouquets are themselves covered. Notably, the ITC stated that ''[b]ouquets are referred to in the scope definition to indicate that all fresh cut roses are covered, regardless of the form, or packaging, they are imported in.'' ITC Pub. No. 2766 at 9 (March 1994).

Finally, we disagree with respondents' contention that petitioner lacks standing in this investigation because it does not represent producers of bouquets or producers or ''roses in bouquets.'' In order to have standing in an antidumping investigation, petitioner must produce, or represent producers of, the like product. *See, e.g., Final Determination of Sales at Less Than Fair Value: Nepheline Syenite from Canada*, 57 FR 9237 (March 17, 1992) (comment 5). We agree with the ITC that there is one like product in this investigation—''all fresh cut roses, regardless of variety, or whether included in bouquets.'' ITC Pub. No. 2766 at 9, 14 (March 1994). Because petitioner represents producers of fresh cut roses they have standing in this investigation.

Comment 2: Spray Roses

Respondent HOSA, an exporter/purchaser of spray roses, argues that spray roses are a genetically distinct species of the *rosa genus*. Therefore, HOSA argues that the Department should exclude spray roses from the scope of the investigation. HOSA states that spray roses are not explicitly included in the scope of the investigation. Furthermore, HOSA argues that spray roses were never mentioned in the petition nor were price or cost of production data provided in the petition for spray roses. HOSA suggests that the Department analyze spray roses pursuant to the criteria set out in *Diversified Products* analysis to evaluate whether spray roses are within the scope of this investigation.

Petitioner requests that the Department include spray roses in the antidumping duty order. Petitioner states that since the description of spray roses is found in the petition, the instant investigation and the Department and ITC determinations are dispositive as to the scope of the investigation and analysis under *Diversified Products* is unnecessary, (although respondent provides an analysis under *Diversified Products*). Petitioner asserts that all fresh cut roses, without regard to stem length, species or variety, were specifically covered in the scope of the petition. Petitioner contends that the fact that spray roses may be of a distinct species of the *rosaceae* family does not exclude them from the petition, since the petition includes all roses, regardless of species. Although it claims it as unnecessary, petitioner conducts an analysis under the *Diversified Products* criteria to show that spray roses are properly included in the scope of the petition.

DOC Position

We agree with petitioner. The descriptions of the merchandise in the petition and in the Department's scope are dispositive with respect to spray roses and the evidence on the record, including the ITC's preliminary determination, supports treating this rose variety no differently than other varieties within the same class or kind of merchandise subject to these investigations.

The scope of the petition clearly refers to spray roses. First, the petition notes that the scope ''* * * covers all fresh cut roses, whether imported as individual blooms, stems or in bouquets or bunches.'' Spray roses are fresh cut roses sold in bunches or bouquets and are classified under the HTSUS subheading 0603.10.60, as are standard roses. Second, the petition states that its scope is ''* * * inclusive of all imported roses from Colombia and Ecuador, without regard to stem length, species or varieties.'' Third, the scope description in the petition cites the ITC's definition from the prior roses investigation. *See* ITC's Publication 2178 at 4–15 (April 1989) ''Roses are members of the *rosaceae* family. * * *'' Genetically, spray roses are members of the *rosaceae* family, as are standard roses.

While differences exist between spray and standard roses, it should be noted that differences also exist between other varieties of roses within the scope of this investigation. The ITC stated in its preliminary finding of fresh cut roses from Colombia and Ecuador that ''* * * we note that different rose varieties also have varying stem lengths and bloom sizes (*e.g.*, as with spray roses, sweetheart roses have smaller buds and shorter stems than traditional roses), which we do not find to be significant differences in physical characteristics.'' *See* ITC Pub. No. 2766 at 10 (March 1994). Although the ITC's preliminary finding is not dispositive with respect to this scope analysis, it clearly demonstrates that the physical differences of each rose variety within the same like product category are not merely unique to spray roses, and that the differences of the varieties within the same like product category are not sufficient ''to rise to the level'' of differences in the like product.

We also note that the rationale used by the ITC in these investigations, of including spray roses within the same like product category, is consistent with the Department's rationale as to whether a product should or should not be in the same class or kind of merchandise. In its notice of final determination of sales at LTFV in *Antifriction Bearings from West Germany*, 54 FR 18992 (May 3, 1989), the Department stated that ''the real question is whether the difference is so material as to alter the essential nature of the product, and therefore, rise to the level of class or kind differences.'' The class or kind of merchandise subject to these investigations includes different rose varieties such as sweethearts or miniatures, intermediates, and hybrid teas. Like spray roses, each variety within the class or kind differs from the other varieties. However, in this instance, the similarities greatly outweigh the dissimilarities and the dissimilarities do not alter the essential nature (*i.e.*, that spray roses are export quality roses) of the spray roses.

Comment 3: Rose Petals

Simpson & Turner, an importer of rose heads, rose petals (petals), and foliage (by-products) argues that such products should be excluded from the scope of this investigation because these products are not the same ''class or kind of merchandise'' as the subject merchandise. Simpson & Turner maintains that the petition refers to stems, but does not mention petals or foliage, and the HTSUS description refers to flower buds as ''flower buds of a kind suitable for bouquets or for ornamental purposes.''

Simpson & Turner argues that rose heads, rose petals and foliage were not

mentioned in the Department's LTFV investigation's initiation or preliminary determination. The scope description specifically refers to a fresh cut rose as a bloom, which is clarified to be a stem. The scope description then defines the form of importation of the stem as an individual, part of a bouquet or bunch.

Petitioner asserts that Simpson & Turner fails to distinguish imported ''rose bush foliage, rose petals, and rose heads'' from ''culls'' within the scope of the this investigation. Petitioner asserts that culls are within the scope of the petition and investigation. Petitioner states that in its preliminary determination, the Department found that culls are a ''such or similar category'' separate from export quality roses but nonetheless covered by the petition and states further that no party has challenged the Department's determination that culls are within the scope of the investigation.

Petitioner states that the description of merchandise provided by Simpson & Turner, however, invites the Department to issue a scope ruling that would permit culls to enter the United States outside the order. To the extent that Simpson & Turner seek to exclude more than loose rose petals, loose rose foliage, or stems without rose heads, the described merchandise apparently consists of culls, which as such are included by the plain language of the petition and by the Department's unchallenged ruling concerning ''such or similar'' categories.

Petitioner further notes that culls are simply roses that did not meet the criteria of quality and length required for export. Culls may ''have crooked stems, deformed buds, or have opened prematurely.'' (Guaisa § A Resp. at 26). Consequently, petitioner asserts that the roses imported by Simpson & Turner, consisting of rose heads with very small stems or of roses ''normally discarded at the farm level in time of grading due to poor appearance, stage of development and scarring'' meet the definition of culls and should thus be included within the scope of these investigations.

DOC Position

We agree with Simpson & Turner. *See Scope of Investigation* above, indicating that loose rose foliage (greens), loose rose petals and detached buds should be excluded from the scope of these investigations.

The scope used in the preliminary determination clearly stated that roses which are imported as individual blooms (stems) or in bouquets or bunches are included. However, we asked petitioner to comment on this scope issue at the December 12, 1994, Colombia hearing, at which time petitioner clearly stated that it does not consider loose rose foliage, loose rose petals or buds detached from the stem to be included in the scope of these investigations.

Comments Pertaining to USP

Comment 4: Annual and Monthly U.S. Price Averaging

Petitioner argues that USP should not be averaged over a full month or over a year because such prices would be unrepresentative of transaction-specific, daily or weekly U.S. sales. Petitioner claims that both monthly and annual averaging would obscure or mask dumping. Petitioner contends that monthly averaging would mask dumping of roses at low prices within every month and that annual averaging would be even more distortive, concealing dumping during months in which major holidays occur.

Petitioner claims that the facts in the instant *Roses* investigations do not support the reasons articulated in the *Flowers* administrative reviews for departing from the normal Department practice of using daily U.S. prices. Specifically, petitioner maintains that, because roses have a shorter life span than other fresh cut flowers, there is no basis for using a monthly average U.S. price. Petitioner also asserts that respondents' inability to control production, timing, or prices is irrelevant to the application of the averaging provision in the statute.

Respondents claim that the Department erred in the preliminary determination by comparing one average constructed value encompassing all varieties and stem lengths to a product-specific monthly average USP. Respondents argue that this comparison is inappropriate because, although growers do not maintain cost records on a variety-specific or stem-specific basis, different rose products have different physical characteristics and different costs and values related to productivity and consumer preferences, all of which result in widely different prices. Respondents assert that if costs are standardized, yet prices fluctuate according to consumer demand for particular rose products, average costs can only be meaningfully compared to equivalent average prices without artificially creating margins. Respondents argue that an annual average constructed value should be compared to an annual average USP. Respondents state that the unique factors characterizing rose production, demand, and perishability, in addition to extreme seasonality, compel the use of annual average U.S. prices.

Respondents maintain that using any type of monthly average USP in the comparison measures only seasonality and not dumping. Specifically, respondents argue that the Department must take into account: (1) That the USP cycle is an unavoidable consequence of the highly seasonal nature of U.S. demand; (2) the high perishability of the product; (3) the rose production cycle is geared towards consumer demand which is concentrated around Valentine's Day; and (4) roses cannot be stored and rose production is a continuous process that cannot be turned off after Valentine's Day. According to respondents, these conditions result in unavoidable price swings. For these reasons, respondents contend that using any type of monthly USP average artificially creates dumping margins by establishing a benchmark that no producer can meet.

In addition, respondents contend that using monthly average USP does not account for month-to-month volatility caused by the extreme seasonality of U.S. demand. Therefore, respondents maintain that monthly average U.S. prices are not representative for purposes of comparison with an annual CV and that only an annual average USP captures the full demand/production cycle, undistorted by seasonal factors.

Regarding petitioner's contention that the Department should not use a monthly USP in the *Roses* cases because, unlike flowers, roses have a shorter life, Floramerica points out that shelf life alone does not justify a departure from the Department's traditional averaging methodology and further, that there is information on the record which shows that roses do not have a shorter shelf life.

DOC Position

19 U.S.C. 1677f–1(b) and 19 353.59(b) provide the Department with the discretionary authority to use sampling or averaging in determining United States price, provided that the average is representative of the transactions under investigation. In these investigations, we determined, based on a combination of factors, to average U.S. sales. The Department was confronted with approximately 555,000 Colombian transactions which, when combined with the number of estimated U.S. sales transactions from Ecuador, exceeded one million. As a result, a decision to make fair value comparisons on a transaction-specific basis would place an onerous, perhaps even an impossible, burden on the Department in terms of data collection, verification, and

analysis. Consequently, we exercised our discretion in order to reduce the administrative burden and maximize efficient use of our limited resources. Additionally, we recognize the need for consistency in our treatment of these concurrent investigations and, although the number of transactions may vary between the two countries, uniform application of an averaging methodology ensures that both Colombia and Ecuador will be treated on the same basis. *See* the June 24, 1994, Decision Memorandum pertaining to reporting requirements from Team to Barbara Stafford.

Moreover, we took into account that the majority of respondents, who make U.S. sales on consignment, have little, if any, ability to provide the level of detail which would have been required for the Department to do a transaction-specific analysis because unrelated consignees generally keep accounts for respondents' U.S. sales in monthly grower reports. Upon review of data submitted, and later verified, we concluded that a month was the shortest period of time which would permit all respondents to provide U.S. sales information on a uniform basis, thus ensuring that we treated all respondents in a similar manner in terms of data collection and analysis.

Importantly, because of the highly perishable nature of the product, we believe that monthly averaging of U.S. prices in these investigations provides a fair and more representative measure of value. Unlike nonperishable merchandise, respondent growers cannot withhold their roses from the market to await a better price. Rather, respondents are faced with the choice of accepting whatever return they can obtain on certain sales, so-called ''end-of-the-day'' and ''distress sales'', or of destroying the product. Were we to perform a transaction-by-transaction comparison, such an approach, beyond the limits imposed on the Department as described above, would give undue and disproportionate weight to end-of-the-day sales. Even where a respondent's normal sales were above fair value, he could be found to be dumping solely on the basis of sales made as a result of perishability. By adopting a monthly averaging period, we ensure that the entire range of distress and nondistress sale prices are covered.

Furthermore, while use of actual prices and transaction-by-transaction data is the norm, the statute allows for averaging provided such averaging yields representative results. We conclude that, in light of the above factors, using monthly averages of U.S. sales prices constitutes the shortest period necessary to capture a representative analysis of the ordinary trading practices in this industry. Our approach is consistent with the Department's past practice in investigations of fresh cut flowers as well as other perishable agricultural products. *See Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review*, 55 FR 20491 (May 17, 1990); *Final Determination of Sales at Less Than Fair Value: Certain Fresh Cut Flowers From Mexico*, 52 FR 6361 (March 3, 1987). Furthermore, our approach has been upheld consistently by the court. *See Floral Trade Council* v. *United States*, 775 F. Supp. 1492, 1500–2 (CIT 1991); *Asociacion Colombiana de Exportadores de Flores* v. *United States*, 704 F. Supp. 1114 (CIT 1989).

Lastly, we are unpersuaded by two additional arguments proffered by petitioner to shorten the averaging period in these investigations. First, petitioner claims a factual distinction between the life-span of a rose and a fresh cut flower. However, we find that the record in these investigations establishes that from the time of importation, roses last approximately seven to ten days, while flowers last approximately ten to fourteen days and both may be held for more than one week in refrigerated coolers. Thus, we find this to be a distinction without a difference. Second, petitioner argues that, by not using a shorter averaging period, dumping during peak holiday periods such as at Valentine's Day, will elude the Department. According to petitioner, sales of roses imported before this holiday, but which are sold after the holiday when demand is quite low, will be sales at dumped prices. The petitioner does not consider such dumped sales legitimately within the category of end-of-the-day sales, for which our averaging period is designed to fairly account. Rather, petitioner argues that by averaging these low-priced sales with high-priced holiday sales for the month of February, dumping will be understated. While we recognize that using a monthly averaging period could result in some offsetting of high-priced sales with low-priced sales, we believe that overall, monthly averaging is representative of the transactions under investigation. Moreover, in verifying numerous companies' February grower reports we found that only an insignificant number of roses were imported in February after Valentine's Day, as compared to the overwhelming volume imported during the first 13 days of the month, thus ameliorating this circumstance.

Annual Averaging

While we recognize that averaging is necessary in these investigations, we believe that averaging U.S. sales prices over a year is inappropriate. As we stated in *Flowers*,

> nothing in the statute, the legislative history, or the Department's practice (including *Final Determination of Sales of Not Less Than Fair Value: Fresh Winter Vegetables from Mexico* (45 FR 20512; March 24, 1980) supports the broad notion of annual averaged U.S. prices. Annual averaging would extend too much credit to respondents by allowing them to dump for entire months when demand is sluggish, so long as they recoup their losses during months of high demand.

See Final Results of Antidumping Administrative Review and Revocation in Part of the Antidumping Duty Order: Certain Fresh Cut Flowers from Colombia, 56 FR 50554, 50556 (October 7, 1991). The CIT has agreed with the Department that monthly averaging adequately compensates for perishablilty but averaging over a longer period could obscure dumping. *See Floral Trade Council v. United States*, 775 F. Supp. 1492, 1500 (CIT 1991).

Even though respondents argue that the demands of the U.S. market determine their U.S. pricing and that they are price takers rather than price setters, we note that the intent to dump is not the issue. *See Final Determination of Sales at Less Than Fair Value: Certain Fresh Cut Flowers from Mexico*, 52 FR 6361, 6364 (March 3, 1987). The issue is whether, in fact, dumping is occurring.

Comment 5: Product Averaging

Regarding the use of variety and stem-specific monthly average USPs, respondents contend that the Department is bound by its longstanding administrative practice in the original investigations and subsequent administrative reviews of *Flowers* to calculate monthly average USPs by flower type, without regard to variety or grade. Additionally, the Department has consistently concluded that comparing CV data by flower type to grade or variety-specific USPs would produce unfair and distorted results. Respondents maintain that the Department has not furnished any reasonable explanation for its departure from this practice in the preliminary determination.

Respondents urge the Department to compare all rose products to all rose products on an annual average basis. Alternately, respondents request that the Department compare product-

specific, monthly U.S. prices to identical product-specific, monthly FMV prices. Respondents note that where FMV is not available, CV should be used. However, the profit element should be monthly FMV profit, not annual FMV profit. In addition, respondents argue that average CV of all products combined must be compared to U.S. prices of non-matched products.

Petitioner argues that product averaging should not be used to obliterate differences in prices due to physical differences in roses. Petitioner stresses that it is particularly important that the prices of the low-priced Visa roses are not averaged together with prices of other red roses. Petitioner maintains that an average across varieties, colors, or stem lengths substantially distorts the market reality.

DOC Position

We agree with respondents that averaging by flower type is appropriate in this investigation. Consistent with *Flowers*, where possible, we compared USP and CV on a rose type basis, *i.e.*, hybrid tea, sweetheart, etc. *See, e.g., Fresh Cut Flowers From Colombia*, 59 FR 15159, 15160–61 (March 31, 1994) (4th admin. review final). For a number of companies, however, we were unable to compare USP and CV on a rose type basis because the respondents do not keep their cost data in such a fashion. As a result, in order to ensure an ''apples-to-apples'' comparison, we aggregated U.S. price data to arrive at a weighted-average monthly USP for all rose types for comparison with respondents' single average CV for all rose types. While it would have been preferable to disaggregate rose costs for these respondents in order to make a fair value comparison on a rose type basis, we were not able to do so in this investigation because the data were not available and we did not present respondents with a methodology for disaggregating costs. However, we intend to do so in any future administrative reviews if an order is issued. We will seek to devise a method to enable us to compute cost by rose type, which will not require respondents to change their method of recordkeeping.

Comments Pertaining to Third Country

Comment 6: Third Country as Basis for FMV

Petitioner maintains that there is no basis in law for rejecting third country prices that are adequate to establish a viable market. In addition, petitioner states that the Department's regulations state a preference for the use of third country prices, where the home market is not viable. Petitioner maintains that the statute prescribes adjustments for differences in circumstances of sale, which can take account of differences in markets, but it does not permit the Department to simply reject a viable market, due to factors other than dissimilar merchandise, for the purposes of determining FMV.

Petitioner claims that there is no evidence on the record to establish that third country prices are incompatible for comparison to U.S. prices. Petitioner questions the validity of respondents' statistical studies, claiming that the statistical analyses provided by Drs. Botero and Sykes and Lewis are unworthy of consideration because they exclude the impact of dumping in their price analyses. According to petitioner, if the Colombian and Ecuadoran growers are dumping during the several off-peak (non-holiday) months in the U.S. market, but not in other markets, such dumping would produce price changes in the U.S. market that are much sharper and greater than the price changes in Europe, thereby causing the greater volatility in the U.S. market identified by respondents. Petitioner adds that, because the Colombian and Ecuadoran imports constitute such a large percentage of the U.S. market and because they sell through consignment agents on a national basis, the supply of Colombian and Ecuadorian roses uniformly depresses U.S. prices whenever those imports oversupply the U.S. market.

Petitioner argues that the Botero and Sykes and Lewis reports are further skewed because they use the prices of a single variety of red rose, the Visa, which it asserts is the most price sensitive. Moreover, these reports did not provide source documentation showing the composition of the Dutch auction prices relied upon. Thus, it is unclear how many varieties of roses were included in the comparison database. In addition, since Colombian and Ecuadoran roses sold on the Aalsmeer auction account for only a very small portion of all roses exported to the EU, Aalsmeer prices may not be representative of Colombian and Ecuadorian rose prices in the EU.

Petitioner argues that the statements provided in the Hortimarc Report based on FTD data, which included traditional retail florists and excluded non-traditional outlets such as supermarkets, and mass merchandisers, ignores a significant number of spontaneous purchases from their analysis.

Petitioner states that the Stern & Wechsler argument regarding the opposing demand strains of the U.S. and EU market are irrelevant to the comparison of foreign market values and U.S. prices. Petitioner maintains that the U.S. market is as supply driven as any other market during non-holiday months.

Petitioner recognizes that in the second administrative review of *Fresh Cut Flowers From Colombia*, (55 FR 20491, May 17, 1990) (*Flowers*), the Department departed from its normal practice and rejected third country prices in favor of CV for the following three reasons: 1) third country and U.S. price and volume movements were not positively correlated which showed that different forces operated in the relevant markets, in some instances, pushing prices in opposite directions; 2) third country sales only occurred in peak months which resulted in a distorted comparison of off-peak U.S. prices to peak third country prices; and 3) the perishable nature of flowers and the inability to control short-term production resulted in ''chance'' sales.

Petitioner argues that the Department's analysis of statistical data on the record in these investigations confirmed a positive correlation in prices, thus refuting the principal finding of the *Flowers* case. In fact, petitioner argues that the basis for creating an exception to the statutory preference for price-to-price comparisons was the presence of a negative correlation. Regarding volatility, petitioner notes that in *Flowers*, the Department never required that prices be equally volatile in each market; volatility alone does not require the Department to reject a price-to-price comparison. In fact, petitioner argues that in *Flowers* the Department found differences in volatility between the U.S. and European markets and price movement in opposite directions in each market.

Regarding the second factor, petitioner observes that, unlike the *Flowers* case, third country sales of roses even occur in off-peak months and argues that the Department's six-month weighted average FMVs take into account seasonal peaks and off-peaks. Moreover, petitioner maintains that major flower buying holidays are the same in all markets and, therefore, peaks will occur at similar times in all markets.

Finally, with regard to the issue of perishability and production control, petitioner maintains that respondents may control production by pinching back rose buds. In addition, petitioner notes that there is evidence on the record indicating that third country sales of roses are stable, some occurring as a result of negotiated standing orders

and, therefore, there is a lesser incidence of chance sales then was present in *Flowers*. Petitioner contends that statements by respondents regarding a potential shift of exports from third country markets to U.S. markets reveals the extent to which respondents, in fact, control, plan, and target their rose exports to certain markets.

Respondents claim that third country prices should be rejected in favor of CV because the three factors found in *Flowers* are present in these cases. With regard to the first *Flowers* factor, respondents quote empirical evidence on the record showing substantial differences in demand and pricing seasonality between U.S. and third country markets. Respondents argue that there are two principal aspects of seasonality: timing (*i.e.*, the point in time at which demand peaks and valleys occur in seasonal cycles) and volatility (*i.e.*, the magnitude of peaks and valleys). Respondents argue that, in *Flowers*, the Department relied on both differences in timing and in volatility to explain why it rejected third country prices. Respondents assert that in the rose industry, as in the flower industry, (1) the U.S. market is holiday-demand driven; (2) U.S. demand is not a stable consumption base because the majority of roses are purchased primarily as gifts; and (3) the U.S. market is demand driven. In contrast, respondents state that (1) the European market is marked by relatively even year-round demand; (2) flower purchasing on a more regular basis (not tied to gift giving) is a deep rooted tradition in Europe; and (3) the European market is supply driven.

Respondents have submitted several statistical analyses of the different markets which, they claim, conclusively show that the seasonal demand and pricing patterns are significantly different between the markets. Respondents point to the second Botero report and the Sykes & Lewis report which states that the mere presence of a price correlation is insufficient proof that demand patterns are equivalent. Respondents contend that while petitioner criticizes their statistical analysis, petitioner has not provided any independent correlation analysis regarding U.S. and third country prices.

With regard to the second *Flowers* factor, access to third country markets, respondents claim that petitioner's own data rebut the contention that respondents have substantial continuous access to third country markets because there are no Colombian and Ecuadorian imports of roses in at least one month for every country for which petitioner has provided data. Respondents assert that petitioner's claim that Colombian and Ecuadorian production is planned with third countries in mind, and that roses are sold at the same fixed price over a period of time as a result of a pre-negotiated arrangement, is a misunderstanding of the facts on the record.

In addition, respondents claim that combining third country markets would not rectify the gaps created by the absence of sales in all months in individual markets. Respondents note that adding two markets with partial year sales is still tantamount to using only peak prices for foreign market value. With regard to the third *Flowers* factor, respondents claim the control and perishability factor relied upon by the Department in the *Flowers* case is equally applicable to roses. Respondents cite to portions of the Department's *Roses* preliminary determination where the Department noted that there are substantial similarities between flowers and roses in perishability and short-term lack of production control. Respondents also cite to the first Tayama report which states that roses are even more perishable than fresh cut flowers.

Respondents claim that petitioner oversimplifies their argument regarding seasonality by neglecting to view all aspects of the *Flowers* exception: the unique combination of differences in seasonality between U.S. and third country markets for a highly perishable product for which production cannot be controlled in the short term. Thus, respondents maintain that the *Roses* case is a logical extension of the *Flowers* case.

DOC Position

The Department agrees with respondents. In the preliminary determination, we rejected respondents' request to use CV as the basis for FMV because we determined that the record at that time did not support the application of the *Flowers'* precedent. Since the preliminary determination, a considerable amount of new information has been submitted. Based on our review of this new information, we have determined that the records in these cases warrant rejection of third country sales in favor of CV. *See* the January 26, 1995, Decision Memorandum pertaining to third country versus constructed value from the Team to Barbara Stafford for a more detailed discussion of this issue.

Information on the record establishes that the three factors identified by the Department in *Flowers* as supporting the use of CV are satisfied in this case. First, the market for roses in the U.S. differs significantly from the markets in third countries. For example, as in *Flowers*, price and quantity within the United States' rose market are positively correlated; however, the price and quantity within Europe, Canada, and Argentina are negatively correlated.

Similarly, the U.S. market for roses, like the U.S. market for flowers, is more volatile in terms of price and quantity movements than the markets in third countries markets; the European per capita consumption of flowers is four to ten times greater than the United States, and Colombian and Ecuadorian producers have, in general, limited access to the main third country markets, *i.e.*, the Dutch auction. Thus, the differences in the rose markets are similar to the differences that existed in *Flowers*.

The second *Flowers* factor we considered was whether a comparison of third country sales to U.S. sales would require comparisons of low-price U.S. sales in off-peak months with high-price third country sales in peak months, or vice versa. In the preliminary determination, we found that this factor was not present in these investigations because (1) there were sufficient third country sales in each month of the POI (when markets were combined); and, (2) using two six-month FMV periods reduced distortion caused by price comparisons involving peak and non-peak periods.

For purposes of this final determination, we have determined that use of third country prices could result in off-peak U.S. sales being compared with peak third country sales. While six-month averages ameliorate potential distortions, almost all of the respondents do not have third country sales in every month of the POI. It is only by combining markets that respondents have sales in each month of the POI. If we were to use third country prices as the basis for FMV, prices during peak periods in one third country could be combined with prices during peak periods in another third country. These peak prices would then be compared to both peak and non-peak periods in the United States. We find that this factor supports use of CV in these cases, albeit to a somewhat lesser degree than in *Flowers*.

The third *Flowers* factor we considered was the extreme perishability of roses—*i.e.*, the inability to control short-term production—and the resultant ''chance'' element to sales. As noted in our preliminary determinations, there are substantial similarities between the subject merchandise in these investigations and

Flowers: (1) roses, like flowers, are extremely perishable; (2) rose growers have relatively minor control over short-term production; (3) rose production is also affected by exogenous factors (*e.g.*, weather, disease, etc.) like other flowers; and (4) roses cannot be stored and we note that there are only very minor alternative uses (*e.g.*, drying).

In conclusion, we have determined that the factors that led the Department use CV instead of third country prices in *Flowers* are present in these investigations. Therefore, we have adopted CV as the basis for comparison with U.S. prices.

Comments Pertaining to Related Party Commissions

Comment 7: Related Party Commissions

Petitioner requests that commissions paid to consignment agents should be deducted from USP even where consignees are related parties. Specifically, petitioners argue that (1) the statute directs us to deduct commissions from USP in ESP situations, without discretion to disregard U.S. commissions in related party transactions; (2) in *Timken*, the court recognized that the statute required a deduction when a U.S. importer was paid commissions, as opposed to earning ''profits;'' (3) the statute should be followed, regardless of the fact that commissions were not deducted in *Flowers*; and (4) we should deduct U.S. indirect selling expenses if such expenses exceed the related consignee's commissions, in accordance with 19 U.S.C. 1677a(e)(2).

Respondents claim that the Department's treatment in the preliminary determination of related party sales commissions is invalid. They argue that deducting the related importer's commission from U.S. price has the effect of deducting the importer's profit, which the Department does not have the authority to do. The Department should deduct the importer's actual selling expenses rather than intracompany transfers. Respondents argue that the Department's approach is inconsistent with past practice since related party commissions have never been treated as a direct selling expense, but rather have been collapsed in the past for the purposes of determining U.S. price and expenses. Moreover, respondents assert that the Department's statute and regulations do not authorize the Department to deduct the higher of related party commissions or related party actual expenses. Respondents claim that in selectively choosing deductions of commissions or actual expenses, the Department fails to account for the fact that the commission it treats as a cost is also sales related income to the related importer. Respondents maintain that the Department should ignore the sales commissions paid between related parties on ESP sales, regardless of whether such commissions are at arm's length, and treat as U.S. indirect selling expenses the importer's share of operating and selling expenses allocable to the exporter's subject sales.

DOC Position

The difference between a related consignee's commission and the related consignee's U.S. indirect selling expenses is equal to the related consignee's profit. The Department does not deduct profit from USP in ESP transactions because the law does not allow it. 19 C.F.R. 353.41(e) (1) and (2) do, however, instruct us to make adjustments in ESP situations for commissions and expenses generally incurred by or for the account of the exporter in selling the merchandise.

With respect to treatment of related party commissions paid in the U.S., we have in the past looked to the definition of ''exporter'' which provides that related party importers are to be collapsed with, and treated as part of, the exporter. 19 U.S.C. 1677(13). In this context, it is inappropriate to treat a commission the exporter has paid to itself as an expense. The expense is the actual costs incurred by or for the account of the exporter.

In *LMI-Le Metalli Industriale, S.p.A.* v. United States, 912 F.2d 455, 459 (Fed. Cir. 1990) (*LMI*), the CAFC indicated that related party commissions can and should be adjusted for if the commissions are at arm's-length and are directly related to the sales under review.[1] By implication, an arm's-length commission includes the actual indirect selling expenses incurred by the commissionnaire and the commissionnaire's profits. Thus, *LMI* allows us to deduct the profits that are implicit in the commission. The facts in *LMI*, however, are distinguishable from the facts in these investigations. In *LMI*, the Court directed the Department to adjust for sales commissions paid to a related subsidiary of the respondent in the home market. The sales on which the commissions were paid in the home market were purchase price-type transactions made with the assistance of the related party selling agent. The issue of how to treat any selling expenses incurred by the related party selling agent in addition to commissions earned by that related party selling agent did not arise in *LMI*.

In the instant investigations, the sales on which the commissions were paid are ESP transactions where, because the importer of the merchandise is related to the exporter, we collapse the two pursuant to 19 U.S.C. 1677(13) and base USP on the sale to the first unrelated party. In contrast to *LMI*, therefore, the producer and its related party selling agent in these investigations are collapsed. Thus, the commission represents an intracompany transfer of funds. Under these circumstances, our past practice of ignoring intracompany transfers is still applicable.

Furthermore, ESP transactions are fundamentally different from purchase price transactions in that, with respect to ESP transactions, 19 U.S.C. 1677a(e), specifically allows for deductions of indirect expenses. In contrast, with respect to purchase price transactions, 19 U.S.C. 1677a(d) only allows an adjustment for indirect expenses when there are commissions in one of the two markets. Therefore, when commissions are paid in an ESP situation, the opportunity for double counting exists; this problem does not arise in a purchase price situation like the one reviewed by the Court in *LMI*.

Whether the sales involved are purchase price or ESP, the Department's goal is to derive a reliable USP by subtracting actual expenses from actual sales prices. A commission paid by the exporter to its collapsed related importer is not an expense incurred by the exporter; rather the actual expenses incurred by the exporter are the indirect selling expenses of the related consignee.

At the preliminary determination, we determined that related party commissions were directly related to the sales under consideration. However, we agree with respondents and, for the final determination, considered commissions an intracompany transfer. We have therefore, deducted only the amount of U.S. indirect selling expense for all companies with related party commissions.

Comments Pertaining to Accounting

Comment 8: Inflation Adjusted Depreciation and Amortization

Petitioner argues that the Department should compute respondents'

[1] In *Coated Groundwood Paper from Finland*, 56 FR 56363 (November 4, 1991), which was subsequent to *LMI*, we developed guidelines to determine whether commissions paid to related parties, either in the United States or in the foreign market, are at arm's-length. If, based on the guidelines, we found commissions to be at arm's-length, we stated that we would make an adjustment for such commissions.

depreciation expense based on asset values which, in accordance with Colombian GAAP, have been adjusted to reflect the effects of inflation. Petitioner notes that respondents computed depreciation charges for rose production costs based on the historical cost of the underlying fixed assets. Petitioner maintains that because of the effects of inflation on prices, respondents' methodology inappropriately matches historical depreciation charges based on past price levels with revenues generated from the sale of roses at current price levels.

Petitioner notes that in past cases involving hyperinflationary economies, the Department has corrected for the effects of inflation by computing cost of production based on respondent's replacement costs. Petitioner argues that although the POI inflation rates in Colombia did not meet the Department's normal hyperinflation threshold, the annual rate of inflation nevertheless has been so substantial as to cause the government to adopt accounting standards that require an adjustment for inflation. Thus, according to petitioner, the Department must correct respondents' reported depreciation expense in order to avoid distorting the cost of rose production.

Respondents claim that the Department should accept their submitted rose production costs without taking into account the effects of the inflation adjustment on depreciation expense. Respondents argue that, although the inflation adjustment may result in additional costs in their financial statements, these are not actual, historical costs. Instead, the inflation adjusted costs are ''phantom'' costs required by tax law, but not specifically addressed under GAAP.

Respondents maintain that the purpose of the tax law was to generate tax revenues for the government, because any write-up of fixed assets due to inflation results in additional income that must be recognized in a firm's financial statements. Respondents contend that if the Department determines that it must include the effects of the fixed asset inflation adjustment in respondents' rose CV, then it also must reduce CV by the amount of financial statement income generated by the adjustment. Respondents note that such income is directly related to production and, thus, there is no basis for failing to offset costs if the inflation adjustment is included in CV.

Additionally, respondents claim that the Department already effectively makes an inflation adjustment through the use of monthly exchange rates in its computer program. Respondents state that the exchange rate is related to differences in the two countries rates of inflation, and the use of such exchange rates has an effect equivalent to making the year-end inflation adjustment.

DOC Position

We agree with petitioner that respondents' failure to follow their normal accounting practice of adjusting depreciation and amortization expenses for the effects of inflation distorts rose production costs for purposes of our antidumping analysis. The exclusion of the inflation adjustment results in costs which are not reflective of current price levels and thus produces an improper matching of revenues and expenses. Therefore, we have revised the submitted COP and CV figures to reflect inflation-adjusted depreciation and amortization expenses based on the growers' normal accounting practices.

We disagree with respondents' claim that the Department's use of monthly exchange rates effectively makes an inflation adjustment, because the exchange rates are being applied to costs which are reported in understated foreign currency. To avoid distortion in production costs, we have used annual average constructed value figures and converted them to U.S. dollars using a weighted-average exchange rate based on the monthly volume of roses sold by each grower.

We also disagree with respondents' assertion that income resulting from the inflation adjustment is directly related to production and should be applied as an offset to financial expense. This annual revaluation of non-monetary assets does not represent income during the POI. Instead, it merely reflects an increase to respondent's financial statement equity due to the restatement of non-monetary assets to account for inflation.

Comment 9: Statutory General Expenses and Profit

Petitioner claims that statutory general expenses and profit should be based on third country sales, since third country sales and third country profit and general expenses would be used as a basis for FMV when home market sales are not available.

Respondents maintain that the facts of this case and the statute require that Department calculate profit on the basis of home market sales, particularly since the Department made a finding in its preliminary determination that home market sales of export quality roses were made in the ordinary course of trade. In addition, respondents note that where the Department used third country price comparisons in its preliminary determination, if in the final determination the Department chooses to reject third country prices in the final determination in favor of CV, it cannot use annual average third country profit margins in calculating CV, because this would be the equivalent of comparing an annual average third country price to a monthly average U.S. price.

DOC Position

In calculating CV, we used selling expenses based on U.S. surrogates and the eight percent statutory minimum for profit where there was not a viable home market for export quality roses. Where there was a viable, but dissimilar, third country markets, we used U.S. surrogates and the eight percent statutory profit because we have determined that third country markets do not provide an appropriate basis for foreign market value. *See* Comment 6 above.

We used U.S. selling expenses as a surrogate even though certain producers had viable home markets for culls which are included in the general class or kind of merchandise.

19 USC 1677b(e)(1)(B) states that the CV of imported merchandise shall include an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—

(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

(ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost.

19 C.F.R. 353.50(a) states that if FMV is based on CV, the Secretary will calculate the FMV by adding general expenses and profit usually reflected in sales of merchandise of the same class or kind of merchandise.

However, in the final determination of *Certain Granite Products from Italy*, 53 FR 27187, 27191–2 (July 19, 1988)(comment 15), the Department stated that, due to the uniqueness of one of the such or similar categories of merchandise, there was no comparability between sales in the home market and sales in the United States. Therefore, the Department used the U.S. selling expenses as a surrogate in computing CV instead of home market selling expenses. As in *Certain Granite Products from Italy*, we find that, in the instant investigations, culls are not representative of the

merchandise sold in the United States, as these products are by definition not export-quality.

Comment 10: Allocation of Production Costs to Cull Roses

Respondents argue that the Department incorrectly calculated CV by requiring growers to allocate production costs only to export quality roses, thereby assigning no costs to cull roses. Respondents note that because cull roses are included in the class or kind of merchandise, they should be allocated a share of production costs equal to that of export quality roses. Respondents point out that the Department has never held that a product covered by an investigation should be treated as a byproduct having no cost. Respondents also argue that the Federal Circuit in *Ipsco, Inc.* v. *United States,* 965 F.2d 1056 (Fed. Cir. 1990) defined byproducts as ''secondary products not subject to investigation.''

Petitioner asserts that cull roses should be categorized as byproducts to which, from an accounting standpoint, no production costs should be allocated. Petitioner claims that an appropriate measure for determining whether a specific product represents a byproduct or coproduct is to determine if the production process would still be performed if the product in question was the only one produced. According to petitioner, no rose grower would establish operations solely for the purpose of growing culls for sale and, therefore, cull roses are unmistakably byproducts. Petitioner notes that ITA has consistently and correctly treated cull roses as byproducts, with revenues earned from their sale being properly recognized as other income and, thus, deducted from the cost of producing export quality roses.

DOC Position

We disagree with respondents' claim that CV was calculated incorrectly by not allocating any production costs to cull roses. When determining how to allocate costs among joint products, the Department normally relies upon generally accepted accounting principles (GAAP) to prescribe an appropriate cost allocation methodology. One of the factors used to assess the proper accounting treatment of jointly-produced products examines the value of each specific product relative to the value of all products produced during, or as a result of, the process of manufacturing the main product or products. In this regard, the distinguishing feature of a byproduct is its relatively minor sales value in comparison to that of the major product or products produced.

The Department's general practice in agricultural cases has been to offset the total cost of production with revenue earned from the sale of the reject agricultural products. The cultivation costs, net of any recovery from byproducts, are then allocated over the quantity of non-reject product actually sold. *See, e.g., Fresh Cut Flowers from Colombia,* 52 FR 6844 (March 5, 1987); *Fresh Cut Flowers from Peru,* 52 FR 7003 (March 6, 1987); *Fall-Harvested Round White Potatoes,* 48 FR 51673 (November 10, 1983); *Fresh Cut Roses from Colombia,* 49 FR 30767 (August 1, 1984).

In *Asociacion Colombiana de Exportadores* v. *United States,* 704 F Supp. 1114, 1125–26 (CIT 1989), the Court found that ''[c]ulls were often disposed of as waste, or if saleable, were sold for low prices in the local market. ITA's treatment of non-export quality flowers as a byproduct was supported by substantial evidence. The record indicates that cull value was relatively low and that the production of culls was unavoidable. These both have been recognized by ITA in the past as indicia of byproduct status.'' The CIT further noted, ''[c]ull value, if determinable, should be deducted from cost of production and production costs should not be allocated to culls.''

For each respondent in this investigation, the total revenue generated from the sale of cull roses was minimal when compared to the revenue generated from the sale of export quality roses. Other facts concerning the production and sale of cull roses are also consistent with those found in the investigation and subsequent administrative reviews of *Flowers.* We therefore find that it is appropriate to treat cull roses sold in the home market as a byproduct of the production of export quality roses. This treatment is consistent with the Department's previous practice of accounting for culls as a byproduct in the calculation of COP and CV.

Finally, we disagree with respondents' argument that the inclusion of cull roses in the class or kind of merchandise compels the Department to use a particular cost accounting methodology. A decision that a particular product is, or is not, within the scope of a proceeding does not dictate, or necessarily have any relationship to, the selection of the particular cost accounting methodology that must be applied in the determination of COP and CV.

Unlike respondents, we do not read the Federal Appeals Court's decision in *Ipsco* as standing for the proposition that in all circumstances a byproduct for accounting purposes cannot be within the class or kind of merchandise as that term is defined under the Act. Moreover, as discussed above, our decision in this regard has been explicitly upheld by the CIT.

Comment 11: CV—Interest Expense

Respondents argue that the Department grossly overstated each respondents' net interest expense in calculating CV by using total company-wide interest expense instead of the expense allocable to rose production. Respondents request that the Department correct its preliminary calculations in line 38 of the CV tables, and using the allocated per unit interest expense calculated on the spreadsheet.

Petitioner agrees with respondents that net interest expenses were potentially overstated in the preliminary determination and ITA should allocate interest expenses on a sales dollar basis to roses and then to rose stems, provided that interest expenses reported were in fact reported with respect to all sales of all rose types to all markets.

DOC Position

We agree that for some respondents we incorrectly assigned total company-wide financial expenses only to roses. For purposes of the final determination, we allocated net financial expenses to roses and non-subject merchandise using one of the following methodologies, each of which we consider reasonable: cultivated area, cost of sales or cost of cultivation. We computed a per stem financial cost by dividing the net financial expenses related to roses by the total export quality of stems sold.

Comment 12: CV—U.S. Indirect Selling Expenses

Respondents allege that the Department incorrectly included U.S. indirect selling expenses incurred by respondents' related importers in its calculation of constructed value. Respondents claim that including these expenses in constructed value artificially inflated the FMV, since these expenses would never have been incurred to sell roses in the home market. In addition, respondents object to the Department's calculation of an eight percent profit on these expenses, while at the same time deducting related party commissions, and thereby all profit earned by the related importer, from U.S. prices. Respondents hold that the Department should include only all selling expenses incurred in Colombia and Ecuador in its calculation of CV.

Petitioner claims that the Department should include in constructed value direct and indirect selling expenses equal to those expenses incurred in third country markets, unless such markets are not viable. And, to the extent that the Department deems home market sales to be within the ordinary course of trade, and in the event that the home market for any given respondent was viable, then the Department should add home market selling expenses to constructed value. Petitioner states that, in the absence of selling expenses from either the home or third country market, the Department's practice is to add U.S. selling expenses in computing SG&A.

DOC Position

For those companies with viable home markets, we used home market indirect selling expenses. For those companies without viable home markets we used U.S. indirect selling expenses as a surrogate. *See* Comment 9 above. Respondents' objection to deduction of related party commissions is addressed in Comment 7 above.

Comment 13: Per Unit CV in Dollars

Respondents argue that the Department's methodology used to obtain the per unit CV in dollars produces a distorted, declining per unit dollar CV. Respondents note that the Department's method involves converting annual average per unit foreign-denominated costs to monthly per unit dollar figures using the monthly exchange rate, which in part reflects a relatively high inflation rate. Respondents claim that in order to properly obtain the average per unit CV, the Department should first convert each month's total foreign-denominated costs using that month's exchange rate, and then sum these monthly dollar costs for the period. Next, the total dollar costs should be divided by the total quantity of roses sold to obtain the average per unit CV in dollars for the period.

Petitioner does not object to respondents' request for modifications in the Department's methodology, although petitioner suggests that such modifications are unnecessary. If modified however, petitioner argues that it is inappropriate to apply a foreign-dominated interest rate in order to calculate imputed credit costs, unless the exchange rate is also adjusted for currency devaluation.

DOC Position

We agree that in this case the Department's previous methodology used to obtain per unit constructed value in U.S. dollars did not provide an accurate result. In order to avoid distortion, we have converted home market cost in local currency to U.S. dollars using the annual average exchange rate.

Comment 14: Home Market Price Cost Test

Respondents maintain that the Department's sales below cost test does not test whether a particular product is sold below its cost of production. Respondents argue that the Department's normal methodology is to compare prices to model-specific COPs. Because respondents were only able to supply the Department with average COP information representing an entire range of rose production, they argue that the Department should compare annual average COP figures to average home market prices of all varieties and stem lengths.

Additionally, respondents state that, to account for price seasonality, the Department must use annual home market average prices to properly test whether home market sales prices permit the recovery of costs in a reasonable time. Respondents refer to the Botero Report as evidence that the unusual seasonal prices of roses allow for ''below average costs over periods of time, including months, that do not cover a full price cycle.''

Petitioner argues that the court has rejected the comparison of production costs with average home market prices. *See, Timken Co.* v. *United States*, 673 F. Supp. 495, 516–17 (CIT 1987).

DOC Position

While it is our normal practice in determining sales below cost to compare the price of each sale in the home market to the cost of production (COP) of that product during the period under investigation, in these investigations we were not able to do so because the respondents do not segregate their cost data by rose type, variety and stem length. As a result, we determined that to compare one yearly COP (the POI in these investigations is one year), which combines all export quality rose costs to prices for each variety of export quality roses would not be appropriate. *See* Comment 5 above. Instead, we combined prices of home market sales for all varieties on a monthly basis to our annual COP, in conforming with our modified cost test for agricultural products, as discussed below in Comment 15.

Although respondents urge the Department to combine individual sales prices for all export quality roses in the home market on a yearly basis to compare to the yearly COP calculation for export quality roses, respondents have not persuaded us that such a radical departure from our procedure is warranted in these circumstances. As discussed in Comment 15, the Department has a specific test for determining whether or not sales are below cost that encompasses recovery of costs within a reasonable time, which we have applied here.

Comment 15: 50–90–10 Test

Respondents maintain that the Department originally intended to change its 10–90–10 test to a 50/50 test whereby, if less than half of all sales were below cost, then all sales should be used in creating weighted-average FMVs, and if half or more of the sales were found to be sold below cost, then home market sales would be rejected in their entirety and FMV would be based on CV.

Petitioner maintains that respondents have misrepresented the Department's past practice and ignored judicial precedent. Petitioner maintains that the current 50–90–10 test by which the Department removes from consideration ''significant'' quantities of sales made below COP but uses those sales made above cost, is correct. Petitioner maintains that the courts supported the Department's use of remaining above-cost sales as sufficient for FMV in *Timken Co.* v. *United States*, 673 F. Supp. 495, 516–517 (CIT 1987), and that the basic principle applies to all products.

DOC Position

We disagree with respondents. The Department has an established practice which takes into account the realities of selling perishable agricultural products. In *Final Determination of Sales at Less Than Fair Value: Certain Fresh Winter Vegetables from Mexico*, 45 FR 20512, 20515 (March 24, 1980), after examining the nature of sales of vegetables, the Department determined that it was a regular business practice to make a relatively high number of sales of the subject merchandise below cost because of the perishability of the product, which rapidly ages into non-salable merchandise. As a result, the Department determined that were it to apply the normal below cost test used for nonperishable products, *i.e.*, the 10–90–10 test, this would not fairly reflect the economic realities of the fresh vegetable industry. As a result, the Department concluded that it would permit all sales at below cost to remain in the FMV comparison unless more than 50 percent were found to be below cost.

This modified test was clarified in a review of *Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico,* 58 FR 1794, 1795 (January 17, 1991), wherein the Department explicitly stated that the test to be applied for determining sales below cost for perishable agricultural products was a 50–90–10 test, *i.e.,* if between 50 and 90 percent of home market sales consisted of prices below cost, then only the below cost sales were disregarded, while if over 90 percent of sales were below cost then all sales in the home market were disregarded. *See Final Results of Antidumping Duty Review: Certain Fresh Cut Flowers from Mexico,* 56 FR 1795, 1795 (January 17, 1991).

This modified test still remains our current practice and respondent's rationale for the adoption of a straight 50–50 test is an unmerited modification. Were we to adopt respondents' either/or position, *i.e.,* if less than 50 percent are below cost we will use all sales, and if more than 50 percent we will disregard all sales, then we would, in effect, be concluding that 11 percent of widget sales above cost are sufficient to be the basis for FMV but that 49 percent of rose sales above cost are insufficient. This is an illogical result, which we are not prepared to accept.

Comment 16: Duty Deposit Rate—Roses Shipped But Not Sold

Respondents urge the Department to adjust the deposit rate to reflect the fact that many roses imported into the U.S. perish or are destroyed prior to sale. To avoid over collecting duty deposits on roses that never reach the U.S. market, and since there is no way of distinguishing between roses that will be sold and roses that will be destroyed at the time of entry, respondents argue that the duty deposit rate should be adjusted downward to reflect the quantity of roses shipped to the United States, but not sold. This practice is being used in *Flowers.* Respondents suggest the Department multiply any *ad valorem* rates it calculates by the ratio of total quantity sold divided by total quantity shipped, as reported by each respondent.

Petitioner states that all imports at the time of importation are potentially for sale and, therefore, must bear the appropriate cash deposit rate. Because the percentage of roses that will go unsold varies due to season, weather, problems in transportation, etc., petitioner argues that there is no accurate way to adjust for this potential impact.

Additionally, petitioner states that if the Department does adjust the duty deposit rate to account for roses shipped but not sold, than it is appropriate to adjust the deposit rate to reflect the fact that values entered by Customs are arbitrarily established on consignment entries. Petitioner argues that the use of the calculated USP to derive a cash deposit rate may bear no relation to the value used by Customs for collecting duties. Therefore, petitioner believes that the duty deposit rate should be adjusted upwards so that the duty amount collected reflects the potentially uncollectible duty deposits calculated in the final determination.

DOC Position

We disagree with respondent that the duty deposit rate should be adjusted for roses shipped but not sold. We do, however, agree with respondent, in part, that such adjustment is appropriate for assessment purposes, which are distinct from duty deposit purposes. In the case cited by respondents, *Fresh Cut Flowers from Colombia* 55 FR 20491 (May 17, 1990), the Department indicated that it would make such an adjustment in preparing assessment instructions to the Customs Service. The Department did not make such an adjustment to the duty deposit rates in that case and has not done so in subsequent reviews.

We agree with petitioners that all imports at the time of importation are potentially for sale, and that the percentage of roses which go unsold varies with the seasons. Moreover, this percentage will likely vary with each producer and reseller. Thus, any adjustment contemplated would be speculative. It is preferable to wait until the Department prepares assessment instructions on entries covered by these deposit rates and then make such an adjustment based on the actual experience of the affected companies.

Comment 17: Cash Deposits—The Department's Sampling Technique

Respondents claim that the all others cash deposit rate calculated by the Department is not based on a representative sample of the Colombian rose exporting population—it merely reflects the experience of 16 of the largest exporters. Furthermore, according to respondents, the all others rate disregards the representativeness of such experience. Respondents maintain that this is inconsistent with the Department's statutory requirement that any averages and samples used must be representative of the whole. *See* 19 U.S.C. 1677f–1(b).

DOC Position

We disagree with respondents. The Department's normal practice, in accordance with its regulations, is to select that number of the largest exporters of the subject merchandise needed to represent 60 percent of the imports into the United States from the country under investigation. Due to the large number of companies needed to reach 60 percent of imports in this investigation and the administrative burden it would put on the Department's resources to investigate these companies, the Department selected the 16 largest exporters representing over 40 percent of the imports into the United States. *See* the May 2, 1994, Decision Memorandum from the Team to Barbara Stafford.

The methodology used by the Department maximized its coverage of imports into the United States. The technique of selecting the largest exporters was employed in the *Preliminary Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan,* 55 FR 17779 (April 27, 1990). The other suggested sampling methods, stratified and random, were not selected due to the lack of sufficient industry-wide information on the universe of Colombian and Ecuadorian rose growers (approximately 400 companies in Colombia and 100 companies in Ecuador). The collection and analysis of data to determine an appropriate sampling technique was not reasonably within the power of the Department to undertake. Therefore, we have chosen the most representative sample under the circumstances.

Comment 18: Duty Deposit Rate for Volunteer Companies

Respondents argue that the due process clause of the Fifth Amendment to the U.S. Constitution precludes the Department from requiring cash deposits with respect to companies that the Department refused to investigate. Respondents cite *Kemira Fibres Oy* v. *United States,* Slip Op. 94–120 (CIT July 26, 1994) to support their argument that due process is required in antidumping proceedings. Such a course, according to respondents, would represent an unconstitutional deprivation of property without due process of law. Respondents maintain that the cash deposit rate must be set at zero, and that all cash deposits paid to date should be refunded, and any bonds posted should be lifted, for all companies ready and willing to participate, but not chosen by the Department.

Petitioner also refers to *Kemira Fibres* to support its argument that procedural due process guarantees do not require trial-type proceedings in all administrative determinations.

Additionally, petitioner maintains that, as long as the Department adheres to the procedures mandated by Congress and implemented in the Department's regulations, then the Department has afforded interested parties the process due. These regulations, according to petitioner, allow interested parties the right to appear and submit their views on the proceedings of an investigation, but they do not require the Department to investigate every company that requests a company-specific margin.

DOC Position

We agree with petitioner. Although it is the Department's practice to accept voluntary respondents when we have the administrative resources to do so, the Department's regulations do not require that we accept responses from voluntary respondents. Furthermore, pursuant to 19 C.F.R. 353.14(c), the Department is required to investigate exclusion requests only ''to the extent practicable in each investigation.''

Due to the large number of producers and limited administrative resources, the Department was unable to follow its standard practice of investigating 60 percent of the exports of roses into the United States. Accepting these voluntary respondents and investigating exclusion requests would have reduced the number of ''mandatory'' respondents we could select. Because the Department is not required to investigate all voluntary respondents and requests for exclusion, and because the Department followed its regulations and policy concerning voluntary respondents and exclusion requests, we have afforded interested parties the process due.

Comment 19: Exclusion Requests

The Government of Ecuador and Expoflores argue that the Department has deviated from its standard policy by refusing to accept requests for exclusions or the submission of voluntary responses. Respondents further argue that in the instant investigation this departure caused excessive harm because the Department chose to investigate only 40 percent of the Ecuadorian rose industry, rather than the normal 60 percent of exports to the United States. Respondent's argue that three Ecuadorian companies requested in timely fashion an exclusion from any potential antidumping duty order. In addition, respondents claim that Hilsea submitted a voluntary response to Section A of the Department's questionnaire which the Department returned. Respondents argue that, by denying Hilsea the opportunity to submit a voluntary response, the Department deprived it of the opportunity of demonstrating to the Department that it is not dumping subject merchandise in the United States.

Petitioner states that the Department lawfully limited its investigation to the largest Ecuadorian exporters accounting for 40 percent of U.S. imports from Ecuador and should not exclude ''voluntary'' respondents from the final determination, and that the Department has discretion within the time limits of an LTFV investigation to determine ''fair value'' on the basis of a percentage of total imports. Petitioner states that the regulations indicate that the Department ''normally'' will examine imports accounting for 60 percent of the volume or value sold during the POI. Petitioner states that this is not a ''normal'' case, given the volume of transactions and complexity of both it, and the companion investigation of roses from Colombia. Further, petitioner asserts that the Department's regulations specifically authorize the agency to investigate a subset of all exporting companies in an antidumping investigation. Petitioner asserts that the Department is not required to investigate every company with U.S. imports. Finally, petitioner argues that the availability of a refund, with interest, adequately protects respondents that sought to volunteer, but who could not be accommodated due to the sheer number of responses investigated. Petitioner maintains that if such companies receive a lower rate than ''all others'', however, the domestic industry is deprived of due process by a decision that is not based on the record.

DOC Position

We agree with petitioner. Although it is the Department's practice to accept voluntary respondents when we have the administrative resources to do so, the Department's regulations do not require that we accept responses from all who wish to submit voluntary respondents. Further, considering concurrent investigations is within the discretion of the Department.

Comment 20: Exclusion of BIA from ''All Others''

The GOE and Expoflores argue that the ''all others'' rate should not be skewed by the inclusion of a BIA rate. These parties argue that where the Department examines the pricing practices of only a relatively small number of companies, the usual assumption that compels the Department to include a margin based on BIA (*i.e.* that the pricing practices of the investigated companies are representative) is lacking.

Petitioner argues that there is no basis to depart from the standard Department practice of including BIA rates in the calculation of the ''all others'' rate. Specifically, petitioner argues that where BIA rates are not wildly different than rates calculated on the basis of verified data, the court has endorsed the use of BIA rates as part of the calculated all others rate.

DOC Position

We agree with respondents. *See Exclusion of BIA Rate From Calculation of the All Others Rate* section above.

Comment 21: Rejection of Untimely Sales Tape

Petitioner argues that the Department cannot for any purpose accept for the record the revised tapes required to be filed on January 3, 1995. Petitioner quotes a memorandum to the file regarding ''tape submissions'' dated December 30, 1994, which indicates that the Department extended the deadline for filing computer tapes from December 30 to January 3, 1995. Petitioner states that specifically, the memorandum records the deadline as ''9 a.m.'' Petitioner states that, ''filing'' as a matter of law is not complete without service of the tapes upon counsel for petitioner. 19 C.F.R. 353.31(g). Petitioner argues that, under the regulations, ''[t]he Secretary will not accept any document that is not accompanied by a certificate of service listing the parties served, the type of document served, and, for each, indicating the date and method of service.'' 19 C.F.R. 353.31(g). Petitioner states that, in this case, there is no question that counsel for petitioner are covered by the administrative protective order and entitled to receive on a timely basis copies of any computer tapes filed by respondents. Petitioner notes that the Department has previously alerted counsel for Arbusta in this proceeding of the need to serve computer tapes due to counsel's tardiness in serving earlier tapes submitted to the Department. At this very late stage of the proceedings, petitioner claims there is no basis to accept any new computer tapes for the record, where service was not made and the rights of petitioner have been so prejudiced.

Respondents did not comment on this issue.

DOC Position

We accepted respondent's sales tapes and gave petitioner time to comment on these tapes. Although respondents did not provide the sales tapes to petitioner

in a timely manner according to our regulations, we accorded petitioner sufficient time to comment and petitioner, therefore, was not prejudiced. *See* the January 17, 1995, Memorandum to File.

Company Specific Comments

Arbusta

Comment 22

Petitioner argues that respondent's sales to its related U.S. importer (related importer) were reported using an unreliable methodology, and, therefore, U.S. price for these sales should be based upon BIA. Specifically, petitioner takes issue with respondent's methodology for identifying the country of origin of U.S. sales by comparing production records with sales records.

Respondent argues that the Department should accept its method of reporting U.S. sales whose origin cannot be identified from sales records kept in the normal course of business. Respondent further argues that the Department cannot punish it for maintaining commercial records in the ordinary course of its business that do not identify data in accordance with the Department requirements.

DOC Position

We agree with respondent. At verification we noted that, in order to compile its sales listing for the Department, the related importer excluded the following from its total POI sales: (1) sales of non-Ecuadorian origin having a specific origin code; (2) non-subject merchandise; and (3) samples. The result represented sales of respondent-produced merchandise (representing approximately 86 percent of its related importer's total sales of subject merchandise) and sales of ''unknown'' origin. Based on records kept in the normal course of business, respondent's related importer was unable to determine the origin of the remaining sales. However, our review of the related importer's method of using the average price on its grower's report to determine which sales to report suggests that the sales of ''unknown'' origin were priced in accordance with sales of known origin. Therefore, we find the method used to report sales of unknown origin to be reasonable and non-distortive. Moreover, the related importer reported actual prices in its sales listing. Therefore, we have accepted respondent's reporting methodology as reflective of actual experience and have used it for purposes of the final determination.

Comment 23

Petitioner claims we should base the LTFV margin for respondent's consignment sales to two related consignees on BIA as we were unable verify these consignees. Petitioner argues that, with respect to the ESP sales listing for these consignees, as the data on the record was not verifiable and acceptance of the growers report data would constitute the submission of a substantially new response, the U.S. sales listing of ESP sales to these two related parties is unreliable and cannot be used for purposes of the final determination.

Respondent claims that, in preparing for verification, it discovered that sales through its two consignees in Miami had been systematically reported incorrectly in its sales listing, in part because of a computer error. Respondent claims that it immediately sought to rectify these errors by submitting a new sales listing for these consignees on September 28, 1994, as part of its timely response to the supplemental questionnaire issued by the Department on September 15, 1994. Respondent states that the Department erroneously rejected the new sales listing on the untenable grounds that 19 C.F.R. 353.31(a)(1)(i) requires that factual information be submitted ''seven days before the scheduled date on which the verification is to commence.'' Respondent alleges that the Department's interpretation of the regulation was grossly unfair and inconsistent with past precedent as verification of the information was not scheduled until October 19 and 20, far longer than seven days after the submission date of September 28, 1994. Thus, respondent contends that the new September 28, 1994, sales listing was filed well within the seven day deadline set forth in 19 C.F.R. 353.31(a)(1)(i).

DOC Position

We agree with petitioner. Respondent attempted to submit an entirely new, unsolicited sales tape beyond the deadlines established by 19 C.F.R. 353.31(a). Contrary to respondent's assertion, the September 28, 1994, sales listing was submitted less than two business days prior to the October 3, 1994, start of verification. We rejected the sales tape as untimely. Furthermore, when respondent provided excerpts from the untimely revised sales list at verification in Ecuador, we examined them and determined that they showed that the original sales list was substantially inaccurate and would not verify. *See* verification report. Accordingly, we have assigned BIA to these unverified sales. As BIA, we have used the highest of the highest non-aberrational margin calculated for any U.S. sale or the average petition margin.

Comment 24

With regard to the rejected sales tapes of respondent's two related consignees, petitioner argues that there is no basis in the record to apply a ''neutral'' margin where respondent conceded that its original sales listing was erroneous and where the revised data were neither timely submitted nor verified. Petitioner states that partial BIA for purposes of calculating the LTFV margins for the missing sales data should consist of the higher of the highest non-aberrant transaction margin or the average petition margin.

DOC Position

We agree with petitioner. *See* Comment 23 above.

Comment 25

Petitioner contends that, while the verification report erroneously suggests that alleged ''free samples'' or sales with a ''zero'' price should be removed from the sales listing, this conclusion is incorrect under the statute and Department precedent. First, petitioner claims that, as a matter of law, there is no basis to exclude any U.S. sale from the fair value comparison and that the statute applies to all sales, without the limitation ''ordinary course'' or otherwise. *Ipsco, Inc.* v. *United States,* 687 F. Supp. 633, 640–41 (CIT. 1988). Hence, petitioner argues that given an express limitation on the determination of FMV and no corresponding exclusion from USP, statutory construction requires that there be no exception in the latter case. *See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* v. *United States,* 13 F.3d 398, 401 (Fed. Cir. 1994). Second, petitioner claims that, to the extent that a box charge is recovered from sales at a ''zero'' price, such sales are indistinguishable from distress sales. Moreover, petitioner states that because USPs were averaged in order to take account of distress sales, such sales must be included in the sales listing in order to produce a ''representative'' average price. (19 U.S.C. § 1677f–1(b).) An average without including the alleged ''distress'' sales is clearly *not* ''representative'' of all U.S. sales. *Floral Trade Council* v. *United States,* 775 F. Supp. 1492, 1503 (CIT 1991), *appeal pending,* No. 94–1019, –1020. In *Floral Trade Council,* the court affirmed ITA's determination that so-called ''distress'' sales must be included in the U.S. sales listing because ''[a]veraging already

accounts for perishability, and all United States sales both in and out of the ordinary course of trade are included in calculating USP.''

Respondent argues that its one zero-priced transaction should be excluded from the sales listing because providing a sample does not constitute a ''sale'' pursuant to 19 U.S.C. 1673. Respondent claims it had one shipment of sample roses for which it received no revenue whatsoever and that, by legal definition, a sale must include the exchange of money. Moreover, respondent claims the Department has the authority to exclude U.S. sales from a LTFV margin calculation if such sales are not representative of the sellers' behavior and are so small in quantity and value that they would have an insignificant effect on the margin. *See Ipsco Inc.* v. *United States,* 714 F. Supp. 1211, 1217 (CIT 1989) (*rev'd on other grounds,* 965 F.2d 1056 (Fed. Cir. 1992) (*Ipsco*)). Respondent states that this one shipment meets the criteria set out in *Ipsco.*

DOC Position

We agree with respondent. We verified that all sales to one customer in July had been shipped as free samples. In accordance with our treatment of all sample sales in this case, we have deleted these observations from the sales listing. Therefore, the verification report states that U.S. (purchase price) observations 339 through 352 should be removed from the sales listing.

Comment 26

Petitioner states that export taxes are a direct selling expense, and are deductible from USP under 19 U.S.C. 1677a(d)(2). Accordingly, petitioner states that FONIN export taxes should be calculated for all U.S. sales and deducted in the sales listing. Petitioner agrees with respondent that the FONIN tax should not be included in G&A expenses and that such taxes must be deducted separately from U.S. price pursuant to 19 U.S.C. 1677a(d)(2). With respect to the basis for calculating the FONIN taxes, however, petitioner is unclear whether the computer sales listings contain the ''reference value'' declared to the Central Bank of Ecuador. In the absence of these values, petitioner claims there is no record basis for calculating the FONIN tax in a manner that will duplicate the actual tax paid. Petitioner argues that the Department should, therefore, apply the tax to the gross price as the best estimate of the amount paid.

Respondent claims that the Ecuadorian export tax, FONIN, was calculated as 0.5 percent of the reference value declared to the Central Bank of Ecuador and shown on the export invoice. Respondent states that it reported FONIN taxes as part of administrative expenses in its CV tables and the amount of FONIN paid during the POI therefore should be deducted from its administrative expenses. Respondent included FONIN in its indirect selling expense calculation and since this expense is deducted from USP it must also be removed from indirect selling expense to avoid double counting.

DOC Position

We agree with petitioner and with respondent, in part. Section 772(d)(2)(B) of the Act specifically directs that export taxes be deducted from USP; therefore, we have deducted FONIN from USP and adjusted expenses accordingly to avoid double counting. We have calculated FONIN as a percentage of the gross unit price as was done in the preliminary determination.

Comment 27

Petitioner states that credit costs on PP sales should be amended to reflect the correct number of credit days as noted at verification.

DOC Position

We agree with petitioner. Consistent with our treatment of minor changes to submitted data, we have used verified data for respondent's credit days (*see e.g., Final Determination of Sales at Less Than Fair Value: New Minivans from Japan,* 57 FR 21937, 21952 (May 26, 1992) (*Minivans*).

Comment 28

Petitioner states that we should revise the quality credits incurred by respondent's related importer in accordance with the verification report. In its rebuttal brief, petitioner states that it agrees with respondent that the Department should use the revised data received at verification concerning these expenses.

Respondent states that while it provided revised figures for U.S. quality credits, the revisions do not substantially affect previously submitted data. Thus, respondent claims the Department should accept its quality credit calculation as provided by it related importer at verification.

DOC Position

We agree with petitioner and respondent and have used the quality credits as verified. *See e.g., Minivans.*

Comment 29

Petitioner claims that verification of movement expenses on sales through respondent's related importer established that the charges reported to the Department could not be supported by its records. Petitioner cites the sales verification report wherein the Department stated that, with regard to movement expenses, it found that respondent's related importer both over-reported and under-reported certain of these expenses. Accordingly, petitioner states the Department should deny the claimed adjustments and instead apply BIA.

Petitioner argues that for each charge we should impute the highest per-unit amount claimed in any month to all sales. Petitioner notes that the determinations cited by respondent do not support the proposition that any changes identified by a respondent during verification should be made, so long as they are not extensive.

Respondent states that, while it provided revised figures for U.S. movement expenses, the revisions do not substantially affect previously submitted data. Thus, respondent claims the Department should accept its revised figures for movement expenses (brokerage and handling, air freight and inland freight) provided by it related importer at verification and which tied to its accounting system, even though these figures differed slightly from the amounts reported. Respondent argues that the use of the verified movement expenses in the Department's final margin calculation would be consistent with the Department's practice and precedent. Respondent cites the *Final Determination of Certain Steel Products from Italy,* 58 FR 37327 (July 9, 1993), wherein the Department used revised information provided by respondents at verification because it did not substantially amend previously submitted data.

DOC Position

We agree with respondent. We found that the verified movement expenses were not greatly different from the reported figures. Therefore, consistent with our treatment of minor discrepancies found at verification, we have used the verified movement expenses. *See e.g., Minivans.*

Comment 30

Petitioner states that we should increase indirect selling expenses incurred in Ecuador to include the full amount shown in respondent's September 28, 1994, indirect selling expense exhibit. Petitioner notes that

verification in Ecuador established that respondent could not support the total indirect selling expenses incurred in Ecuador and urges the Department to allocate the larger amount to ESP sales as BIA.

DOC Position

We disagree with petitioner that BIA is warranted. At verification, we noted a small discrepancy in respondent's submission. At verification, we tied indirect selling expenses to the general ledgers and trial balances. Consistent with our treatment of minor changes to submitted data, we have used the verified data for respondent's indirect selling expenses. *See e.g., Minivans.*

Comment 31

Petitioner takes issue with the verification of respondent's reported ''estimator'' used to calculate foreign inland freight and states that the Department should base foreign inland freight on BIA for purposes of the final determination.

Respondent states that its foreign inland freight expense was based on the cost paid to its unrelated trucking company to transport roses from the farm to the airport. Respondent claims it accurately reported this expense by dividing the standard charge by the number of boxes shipped, and then dividing the per box charge by the number of stems per box. Respondent claims that the Department verified the accuracy of the standard freight charge by reviewing six selected entries to the freight account from three months of the POI. With the exception of freight charges paid to a former employee, respondent claims the Department found its standard freight charge to be accurate. Thus, respondent states the Department should accept this expense as verified.

DOC Position

We agree with petitioner. Only fifty percent of the entries examined tied to respondent's responses. Therefore, we have used the highest foreign inland freight amount reported in respondent's response as BIA.

Comment 32

Petitioner notes that verification disclosed that respondent offset its short-term interest expenses by income from exchange-rate gains on sales, sales of humus, and ''other'' income. Petitioner claims that none of these income items is allowed as an offset to interest expenses according to longstanding Department practice unless it is directly linked to the interest expenses deducted. *See, e.g., Silicon Metal from Brazil,* 59 FR 42806, 42811 (August 19, 1994) (final results admin. review); *Certain Carbon and Alloy Steel Wire Rod from Canada,* 59 FR 18791, 18795 (April 20, 1994) (final LTFV determination).

Respondent claims it offset financial expenses with short-term interest income and exchange gains generated from sales transactions. Respondent cites the verification report wherein the Department, ''[e]xamined the assets which generated interest income and noted that they were short-term in nature.'' Respondent states the Department also noted that exchange gains that were offset against financial expenses were from sales transactions. Thus, the Department should accept its financial expenses as reported.

DOC Position

We agree with petitioners that these items are not proper offsets to interest expenses as they are of a general and administrative nature.

GUAISA

Comment 33

Petitioner argues that the U.S. sales listing is unreliable and should be disregarded. Petitioner points out that at verification the Department found one U.S. ''sale'' that was reported with a quantity, price and payment date even though the roses were discarded at the county dump. Petitioner contends that this sale was not a sale but a computer generated transaction. Petitioner states that because one of the eight ESP transactions reviewed at verification contained this computer generated transaction, it is unclear whether, and to what extent, other computer generated transactions are contained in the sales listing. Petitioner argues that the reliability of Respondent's related consignee's sales data is in question because of this significant flaw. Therefore, petitioner contends, the Department should not rely upon respondent's data but assign an LTFV margin to respondent based on BIA.

DOC Position

We disagree with petitioner. We examined respondent's records in considerable detail at verification and are satisfied that this discrepancy is not widespread. Therefore, there is no basis to use BIA, and we accept respondent's U.S. sales data for purposes of calculating a margin.

Comment 34

Respondent claims that the Department should disregard disposal sales from its sales listing and that ''disposal'' sales are different from ''end of the day'' (*i.e.,* distress) sales. Respondent states that the purpose of a disposal sale is to discard waste and that disposal sales are made to customers outside the fresh cut flower industry, such as manufacturers of potpourri or dried flowers, and recyclers of cardboard and plastic. Respondent maintains that it has a separate coding system in its computer system for disposal sales and does not pay its U.S. subsidiary a commission on these sales.

Respondent maintains that disposal sales differ from distress sales because they are inflicted with disease or damage before entering the United States. Further, respondent contends that it established at verification that roses classified as disposal enter the United States in damaged or diseased condition.

Respondent also argues that the discarded roses are essentially the equivalent of ''secondary merchandise'' which the Department has excluded from the calculation of USP in other cases (*see, e.g., Certain Cold-Rolled Carbon Steel Flat Products from Argentina,* 58 FR 37062, 37077 (July 9, 1994) (*Carbon Steel*). Respondent notes that in *Carbon Steel,* the Department excluded sales of non-prime merchandise where sales of such merchandise were an insignificant portion of total sales. Respondent maintains that its disposal sales constitute far less than five percent by volume of its related consignee's sales. Respondent claims that the high percentage of monthly disposal sales in May was due to a propagation of botritis.

Regarding ''zero-value'' sales, respondent states that by definition, a ''zero-value'' sale is one for which no revenue has been collected. Respondent asserts that petitioner mistakenly claims that the verification report states that a ''box charge is collected'' on so-called zero-price sales because the verification report does not make any reference to ''zero-value sales'' on the page cited by petitioner. Respondent states that petitioner is confusing zero value sales with disposal sales. The basic legal definition of a ''sale'' necessarily includes the exchange of money; this component is distinctly absent from zero-value sales.

Petitioner argues that: (1) There is no record support and no verified evidence that roses have been damaged or diseased before entering the United States; and (2) there is no basis offered by respondent on which the Department could segregate sales of diseased roses from normal distress sales that result from the perishability of roses.

Petitioner adds that there is a large supply of roses on the market in May due to the fact that roses cut for Valentine's Day have a second ''flush'' by May and may be shipped to the U.S. market, whether or not there is sufficiently strong demand. Therefore, petitioner argues that a particular stem price does not establish that the roses were damaged or diseased. Furthermore, petitioner maintains that distress sales are already accounted for by the use of a monthly average.

Regarding zero-value sales, petitioner maintains that as a matter of law there is no basis for excluding any sales from the fair value comparison (*see Ipsco, Inc.* v. *United States*. 687 F. Supp. 633, 640–41 (CIT 1988) and *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* v. *United States,* 13 F.3d 398, 401 (Fed. Cir. 1994). Petitioner notes that because a box charge was paid on these sales, respondents could easily evade an order by selling roses for a zero price but charging for the box.

Petitioner argues that, to the extent that respondent unilaterally and improperly excluded zero-price sales from its U.S. sales listing, the monthly average U.S. prices are overstated and respondent's sales listing must be rejected and the Department apply BIA.

DOC Position

Regarding ''disposal sales,'' we agree with petitioner and kept these sales in the sales listing. At verification, we observed that a large number of very low price sales were reported in the month of May. Company officials stated that, the fact that a high number of these sales were made at distressed prices in the month of May is not unusual because it is the second harvest of the February crop and occurs in a month when the supply exceeds demand. The fact that, in its brief, respondent refers to these distress sales as ''disposal'' sales does not change the fact that these are distress sales.

Regarding zero value sales, we agree with respondent that these should be treated as sample sales. Respondent reported a small percentage of its U.S. sales as sample sales. Consistent with our treatment of samples in the preliminary determination and for all companies, the Department has excluded sample sales from our U.S. calculation in previous cases (*see, e.g., Final Determination of Sales at Less Than Fair Value: Professional Electric Cutting and Sanding and Grinding Tools from Japan* 58 FR 30144, 30146 May 26, 1993).

Comment 35

Petitioner argues that the Department should use the quality credits reported on the growers reports for ESP sales. Petitioner maintains that the Department was unable to tie the total amount of credits allegedly outside the POI with the total amount given on sales ''inside'' the POI. Petitioner states that, even though respondent's growers reports may contain credits applicable to 1992 sales, it does not contain credits given in 1994 for 1993 sales. Therefore, because credits on the growers reports cover an entire seasonal cycle, it is reasonable to use credits awarded over a full year as the basis for this adjustment even though the credits do not tie entirely to the POI.

Respondent states that the Department identified discrepancies in its related consignee's U.S. quality credit calculation. However, respondent maintains that the Department verified corrected data and, therefore, should use its corrected data in the final determination. Furthermore, respondent states that the difference between the amount the Department was unable to tie from respondent's response to its worksheets differed by only a small percentage from that reported. Therefore, respondent argues that this does not discredit its methodology of excluding credits paid on sales made before the POI and including credits paid after the POI which were on sales made during the POI.

Respondent maintains that the Department has erroneously referred to the ''credit reimbursement'' as if it were a quality credit. Respondent states that this ''credit reimbursement'' is compensation from respondent's related consignee to respondent in the form of an inter-company transfer and bears no connection to quality credits. Respondent explains that the money transferred is actually ''excess'' profit accumulated by respondent's related consignee from sales of roses from other farms during the Valentine's Day holiday. Furthermore, respondent states that this credit reimbursement figure is not found in any quality credit account but, as found by the Department at verification, is recorded in respondent's related consignee's operating statement as a cost of sales. Therefore, the Department should use the verified quality credits, as stated above, in its quality credit calculation and should exclude credit reimbursements from the calculation.

DOC Position

We agree with petitioners. Because there is a discrepancy in respondent's methodology of matching credits in the POI with sales outside the POI, we used the quality credits reported on the growers reports in our calculation, including the credits given on freight and packing. We also included credit reimbursements as a quality credit expense.

Respondent reported in its sales listing the quality credits shown on the growers reports. At verification, we noted that by using the growers reports to report quality credits, respondent had included quality credits which applied to 1992 and excluded quality credits reported in 1994 which applied to 1993. Therefore, at our request respondent attempted to match the quality credits to the month the sales occurred. Respondent provided a breakdown of the quality credits for 1992; however, it did not provide a breakdown of quality credits recorded in its 1994 records that applied to 1993 credits due to the limited time available at verification. Therefore, we were able to determine how, if at all, the quality credits should be adjusted. However, we were satisfied that what they reported is what was actually incurred and found no reason to conclude that the reported figures should not be used. Therefore, we used the verified data from the growers reports.

Comment 36

Respondent argues that at verification the Department found that it received free airline tickets and freight rebates from its freight carriers in recognition of the high level of business given the freight carriers by respondent. Therefore, respondent contends that the Department should treat the value of these tickets and rebates as a deduction from total U.S. air freight expenses.

Petitioner notes that it is unclear whether respondent counted such income as an offset to air freight expenses in its normal books and records. Petitioner states that because neither the sales nor the cost verification reports mention that such an item appeared in respondent's general ledger or was treated other than as income to respondent's officers, the record does not tie the airline tickets to POI sales of roses.

Petitioner contends that although respondent claims that the tickets were rewarded ''in recognition of the high level of business given the freight carriers,'' there is no documentary evidence to support this claim. Petitioner adds that no other Ecuadoran rose grower made a similar claim and there is no support for the claimed adjustment.

DOC Position

Respondent reported an air freight rebate and six free airline tickets received from its air cargo carrier in its response. For the preliminary determination, we deducted the air freight rebate from air freight expenses. We did not deduct the value of the six free round trip airline tickets from respondent's air freight expenses. We verified that respondents received rebates on air freight expenses incurred during the POI. Therefore, we granted the percentage of rebate allocable to roses based on exports of roses to exports of all products. Regarding airline tickets, because these tickets are not a reduction of the air freight expense of respondent, or a reduction to respondent's cost, we discarded the airline tickets from our analysis.

Comment 37

Respondent argues that the Department should accept the reported number of days for purposes of calculating imputed credit calculation on its purchase price sales.

Respondent's accounting system did not electronically link the date of sale and date of payment, instead respondent manually matched invoices and payment records. Respondent stated that, a burdensome and exhaustive task, some errors occurred. However, respondent argues that these errors were not significant and worked to respondent's disadvantage.

Petitioner argues that since the Department only verified a few observations and found pervasive errors in credit days reported the payment days reported are unreliable and the Department should apply BIA. Petitioner asserts that, as partial BIA, the Department should select the longest payment days from a non-aberrational transaction and impute that period to all U.S. sales.

DOC Position

We agree, in part, with petitioner. As BIA, we used the highest monthly weighted-average credit days reported on purchase price sales. At verification, we found that every preselect and surprise sale had an error in the calculation of the number of credit days outstanding for third country and purchase price sales.

Comment 38

Respondent asserts that the Department should use the verified interest rate for the imputed credit expense for purchase price sales. Respondent argues that using the verified interest rate does not substantially effect previously submitted information. Therefore, respondent claims that, the Department, consistent with its precedent and practice, should accept and use the revised calculations. In support of this assertion, respondent cites the final determination of *Certain Steel Products from Italy*, 58 FR 37327 (July 9, 1993) wherein the Department used actual information provided by respondents at verification which did not substantially amend previously submitted data.

Petitioner argues that information regarding purchase price interest rates collected at verification should not be accepted by the Department merely on the ground that the revisions do not substantially affect previously submitted. However, to the extent that these corrections were verified and the Department was satisfied of their accuracy, petitioner does not object to the use of the verified interest rate.

DOC Position

We agree with both parties. We used the verified information for calculating the interest rate for imputed credit.

Comment 39

Respondent, stating that it experienced extraordinary wind damage on August 2 through 7, 1993, argues that the Department should not include in COP or CV, the expenses it incurred to rebuild its greenhouses. Respondent maintains that the hurricane winds experienced during the POI were not a normal event. Respondent states that according to U.S. GAAP, for an event to be considered ''extraordinary'' it ''must be unusual in nature and infrequent in occurrence.'' (*See Floral Trade Council* v. *United States*, Slip Op. 92–213.) Respondent contends that the hurricane winds it experienced were both ''unusual in nature'' and ''infrequent in occurrence.'' Respondent states that this was the first time that winds of such abnormally high and devastating velocity struck the region, and thus such winds were highly abnormal and could not be reasonably anticipated. Accordingly, respondent contends that the Department should base CV on the actual production of the first five months of the POI and expected production for the remaining seven months. In addition, respondent urges the Department to exclude its extraordinary costs associated with the damage from the windstorm.

Petitioner notes that wind, like other weather conditions, is an anticipated factor in growing roses. Petitioner maintains that certain losses occur each year due to weather, disease, or the environment. Therefore, there is no basis to treat respondent's wind damage costs differently for this investigation.

Petitioner argues that respondent did not claim expenses associated with the windstorm as ''extraordinary'' in its financial statements. Thus, petitioner contends, there is no basis upon which normal and allegedly ''extraordinary'' costs can be segregated.

Petitioner maintains that if an adjustment for extraordinary losses is granted, it would be improper for the Department to determine unit costs based on theoretical production. Instead, extraordinary cost from the storm should be removed from the total and then actual costs incurred should be spread over actual production.

DOC Position

We agree with respondent. At verification we reviewed news videos and photographs of the wind damage. The severe wind storm damage resulted in an unusual loss of crop. To make an appropriate adjustment for this loss we have normalized the production level. We have relied upon the actual number of stems sold in January through July 1993. For the months which suffered crop losses due to the storm, *i.e.*, August, September, October and November, we have based our calculations of monthly stems produced on the average of actual monthly sales from the first seven months of 1993. This is a conservative estimate since respondent had plants that would have begun to enter the productive phase during the August-November period. Thus, under normal circumstances, production would have increased to include additional stems harvested from plants just starting the production period when the wind storm occurred.

Finally, we disagree with petitioner that we should remove all expenses as an extraordinary cost and that it would be inappropriate to isolate an extra cost of the storm. The Department determined that the major loss of the storm was the loss of the growing crop, the stems which would have matured over approximately the next twelve weeks. Therefore, we believe that it is appropriate to adjust for the loss of the crop.

Comment 40

Petitioner states that verification disclosed that nursery plants were excluded from the basis for allocating certain costs to rose production. Petitioner argues that by depreciating the rose plants over their useful life, respondent takes account of the pre-production stage of its rose plants. Therefore, respondent should not also exclude plants in the pre-production

stage from the total to which costs are allocated. Otherwise, no costs are attributed to the pre-production rose plants.

Petitioner states that respondent's allocation of services (*e.g.*, insurance and depreciation expenses) by the number of plants, rather than the area in production is reasonable. However, petitioner argues that greenhouse depreciation, machinery and equipment depreciation, insurance on the facility, and service costs are related to area in production, not the number of plants.

Petitioner also argues that the record does not establish that the nursery stock was sold exclusively to unrelated customers. Therefore, if some or all of the nursery stock was used in respondent's greenhouses, then there is no basis for excluding these costs or allocating a portion to rose production.

Furthermore, petitioner contends that because respondent did not segregate these costs in its response, the Department should determine whether the number-of-plants allocation (including nursery plants) reasonably approximates the production-area allocation. If not, petitioner argues that the Department should use the higher percentage as the allocation basis as BIA.

Respondent argues that petitioner's theory that the pre-production stage of a rose plant is accounted for by depreciating rose plants over their useful life is erroneous. Respondent asserts that petitioner is confusing the amortization of pre-production costs of rose plants ultimately grown by respondent for production, with the separate business of selling nursery rose plants to unrelated parties. Respondent maintains that the sale of nursery plants constitutes a separate line of business and the costs of nursery plants, like any other plant not subject to this investigation, should not be included in the CV calculation of fresh cut roses.

Respondent adds that it allocated service, insurance and depreciation expenses on the basis of number of plants which included nursery rose plants. Respondent states that nursery plants are not considered production plants and are sold to unrelated customers in the normal course of business. Therefore, respondent contends that the nursery plants, like any other plant not subject to this investigation, should not be included in the CV calculation.

DOC Position

We agree with petitioner that using the number of plants to allocate certain expenses is not an accurate measure. At verification, we reviewed respondent's plant allocation methodology and determined that it was inaccurate. With the exception of the plants themselves, other inputs in the growing process seem to be more closely linked to the area under cultivation. We also reviewed the calculation of area under cultivation. As we have determined that it is more correct to allocate the costs in question based on cultivation area, we have re-allocated the cost on that basis.

Comment 41

Respondent states that it translated dollar-denominated loans and payments into sucres in its financial statements and that during the POI, that a fictitious loss was created and recorded in the translation gain/loss account. Respondent argues that this account is purely cosmetic and does not reflect actual costs of production. Therefore, the Department should not include the fictitious translation expenses in its CV calculation.

Petitioner asserts that because respondent's so-called ''translation'' losses on foreign-currency loans are recorded in respondent's financial statement in the ordinary course of business and in accordance with GAAP, they should not be disregarded. Petitioner asserts that, in order to repay foreign-currency loans, respondent will be required to convert sucres to the currency of the loan. Therefore, repayment is affected by the exchange rate. Moreover, the overall financial condition of respondent, and its ability to raise capital and obtain loans, is affected by the translation losses shown on its financial statements. Accordingly, petitioner argues, there is no basis to ignore these costs in determining the total cost of production.

DOC Position

We agree with petitioner. The translation loss reflects an actual increase in the amount of sucres that will be paid to settle these borrowings. We have therefore included the translation loss and amortized it over the remaining life of the loan.

Comment 42

Petitioner maintains that respondent treated interest payments to a shareholder as normal interest expenses in its ordinary books and records. Petitioner cites *Kiwi Fruit from New Zealand*, 59 FR 48596, 48599 (September 22, 1994) (final results of admin. review) in which the Department stated:

> Absent specific evidence to the contrary, we consider expenses recorded in a company's financial statements to reflect actual expenses incurred in its operations * * * Respondent has not presented any documentary evidence in support of its claim that the recorded expenses were not actual expenses. Accordingly, we continue to rely on the growers' financial statements for orchard expenses in the final results.

Moreover, petitioner maintains that the proceeds of the loan were used for working capital, not capital expenditures. Petitioner contends that the shareholder and the company did not treat the loan as a stock purchase or otherwise as an increase in capitalization. Therefore, the issue is not whether the interest costs of the loan should be excluded, but whether the provision of working capital was at a favorable less than arm's length rate. If so, petitioner maintains that the transaction should be treated as any other related-party input and revalued at an arm's length interest rate. Alternatively, the interest paid to a shareholder should be treated as income to that shareholder in return for management services. Furthermore, petitioner maintains that because of the nature of the relationship between the shareholder and respondent, the ''interest'' paid to the shareholder should be deemed to be part of his salary.

Respondent states that this ''loan'' was more in the nature of an investment and was recorded in respondent's records as a loan for tax purposes only. Furthermore, respondent states that it followed the Department's questionnaire instructions which state to ''include all interest expenses incurred on your company's long and short-term debt from *unrelated* sources.* * *'' Therefore, respondent states that the Department should not include interest paid to a shareholder as part of respondent's financial costs.

DOC Position

We agree with petitioner. At verification, the Department was unable, due to time constraints, to collect sufficient information to determine what the original classification of a loan should have been. Since the loan was not recorded originally as an equity investment and is reflected in the company's books and records as borrowings, we have no basis to reclassify it as equity. Therefore, consistent with the company's financial statement treatment, we have included interest expense for this loan in our cost calculations.

Inversiones Floricola, S.A.

Comment 43

Petitioner argues that a small rose producer in Ecuador (because its identity is proprietary, it will hereinafter be referred to as ''company X'') is related to respondent and that respondent did not report sales from this farm in its sales listing. Regarding the nature of the relationship, petitioner states that there is sufficient evidence of ownership between respondent and company X. Petitioner argues that: (1) The rose farms of the group most likely have similar production processes and could, therefore, shift production to company X to supply respondent's U.S. customers to take advantage of a possible lower antidumping duty margin; and (2) there is at least a possibility of future price manipulation due to knowledge of marketing and production information for both respondent and company X; (4) there is no evidence on the record of an absence of control of production or sales at the group of companies and that respondent's claim that Sunburst Farms controls marketing, sales, and pricing for respondent are unsupported by the evidence on the record; and (5) even the smallest amount of third country sales by company X would establish the viability of respondent's third country markets. Therefore, petitioner argues that company X and respondent are related parties and as such, company X's sales should have been reported. Petitioner argues that, as cooperative BIA, the Department should assign the average margin from the petition to company X.

Respondent maintains that it is the only rose-producing entity among its related companies, and that it has fully reported its sales and cost information in this investigation. Regarding company X, respondent argues that it is not a related party under 19 U.S.C. 1677(13). Respondent states that it is neither an agent nor a principal of company X. Furthermore, respondent states that it owns no interest in company X and company X owns no interest in respondent. Respondent argues that there is no direct or indirect ownership link between respondent and company X.

Moreover, respondent maintains that respondent and company X operate as separate and distinct entities. Respondent argues that there is no common control between company X and respondent. Company X does not share employees, land, equipment, administrative offices, distribution channels, or pricing and production decisions with respondent or respondent's related farm. Respondent maintains that production, marketing, sales, and pricing decisions for respondent are made by Sunburst Farms Miami and Sunburst Farms Holland in accordance with export market conditions. Furthermore, there are no contractual relations or similar business dealings between respondent and company X.

Regarding petitioner's assertion that respondent could shift production to company X, respondent argues that company X is primarily a dairy farm and does not have sufficient capacity to take over more than a negligible portion of respondent's production. Furthermore, respondent states that the Department verified that no expenses or revenue from any other farm runs through company X's checking account. Respondent thus argues that joint control of both entities cannot be established and therefore, these companies are not related within the meaning of 19 U.S.C. 1677(13). However, if the Department determines that respondent and company X are related, respondent maintains that the Department should apply a separate rate for company X, and that the Department should use respondent's verified data to calculate its rate.

DOC Position

It is the Department's practice to collapse parties related within the meaning of section 771(13) of the Act when the facts demonstrate that the relationship is such that there is a strong possibility of manipulation of prices and production decisions that would result in circumvention of the antidumping law. *See Nihon Cement Co.* v. *United States,* Slip Op. 93–80 (CIT May 25, 1993); *Certain Iron Metal Construction Castings from Canada,* 55 FR 460, 460 (January 5, 1990) (final results of admin. review); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 FR 18992, 19089 (May 3, 1989) (final results of LTFV investigation). Based on the evidence on the record, we find that respondent and company X are not related parties within the meaning of section 771(13) of the Act and, as a result, should not be collapsed in this investigation.

Pursuant to section 771(13) of the Act, the Department examined (A) whether respondent was the agent or principal of company X; (B/C) whether respondent owns or controls any interest in the business of company X, or vice versa; and (D) whether there is any direct or indirect common ownership between respondent and company X, involving at least 20 percent of the voting power or control. The Department found no evidence that any of these statutory indicators of relatedness existed with respect to respondent and company X.

Petitioner's arguments concerning interlocking shareholders, shifting of production, possibility of price manipulation, and control of production and sales, are inapposite because they are related to factors that the Department considers in determining whether to collapse companies for the purpose of calculating a single dumping margin. *See, e.g., Antifriction Bearings from France, etc.,* 58 FR 39729, 39772 (July 26, 1993) (final results of 3d admin. review) (''*AFBs III*''). Significantly, however, a collapsing analysis is only done on related parties. *See, e.g., AFBs III* at 39772. (''[T]he Department uses * * * factors in determining whether to collapse related enterprises. * * *'') (emphasis added). In most cases, the relatedness of the parties is quite clear, *i.e.*, a parent and a subsidiary, or two sister subsidiaries. *See, e.g., AFBs III* at 39772. In contrast, in this investigation there is no evidence that, pursuant to the definition of related parties under section 771(13) of the Act, respondent and company X are related. As a result, we have not performed a collapsing analysis.

Comment 44

Respondent argues that the statute requires the Department to use general expenses and profit related to home market sales of the same general class or kind of merchandise that are in the ordinary course of trade. The respondent maintains that its home market sales of culls are the same general class or kind of merchandise as export- quality roses. Respondent also maintains that culls are a regular and recurring part of business in Ecuador and are in the ordinary course of trade. Therefore, the respondent contends that the Department should use its verified home market selling expenses in CV. Regarding profit, respondent argues that the appropriate profit for use in CV is the statutory minimum eight percent.

Respondent argues that if the Department uses its U.S. selling expenses in CV, it must modify its methodology for calculating respondent's ESP offset to eliminate the margin-creating effects of its preliminary ESP offset calculation.

Respondent further argues that if the Department uses its U.S. selling expenses, then the Department should not include the Panama and farm-level components of those expenses in CV. Respondent contends that the inclusion of farm-level or Panamanian expenses

double-counts home market expenses as expenses incurred in the United States are already being used as a supposed proxy. Moreover, the expenses incurred in Panama relating to U.S. sales have nothing to do with the home market because the Panamanian selling agent is involved only with export sales.

Petitioner maintains that the home market is not a viable market in the ordinary course of trade with respect to export quality roses. Petitioner argues that the home market is a market for distress sales. Petitioner states that the Department should use third-country expenses and profits to calculate CV.

Petitioner argues that it is appropriate to add selling expenses on the same terms as the constructed value (*i.e.*, using annual average indirect selling expense). Petitioner further argues that if the Department relies on U.S. selling expenses to compute CV, all U.S. selling expenses, whether incurred in Ecuador, Panama, or in the United States should be included. Petitioner argues that it has been the Department's practice and upheld by the courts that all expenses incurred in selling merchandise in the United States should be deducted from ESP, regardless of whether the entity incurring the expenses was physically located in the United States.

DOC Position

We disagree with respondents and have used U.S. selling expenses as a surrogate (*see* Comment 9). We agree with petitioners that all expenses incurred in selling merchandise in the United States should be deducted from ESP, regardless of whether the entity incurring the expenses was physically located in the United States. Further, we disagree that modification of our standard ESP offset methodology is warranted in this case.

Comment 45

Petitioner asserts that the verification report indicates that common indirect selling expenses were allocated to three Panamanian companies which were involved with the sale of roses. However, petitioner argues that the verification report indicates that certain selling expenses were not allocated to the company involved in the sale of respondent's roses. Petitioner contends that all indirect selling expenses should be reallocated.

Respondent asserts that it allocated its indirect selling expenses among all three of the Panamanian companies based on the relative sales revenue of each company. Respondent argues that the allocation is clearly supported in the verification report.

DOC Position

We agree with respondent. We verified that all selling expenses were reported and allocated appropriately.

Comment 46

Petitioner asserts that the sales verification report indicates that respondent understated its per-unit indirect selling expenses incurred in Ecuador because it allocated its expenses over sales to two related companies. Petitioner argues that, because the Department is unable to segregate respondent's third country sales from third country sales of its two related companies, all third country sales should be excluded from the denominator for purposes of calculating an indirect selling expense factor. Petitioner also contends that respondent has not previously alleged that it performed all export selling functions for all three companies and that it is too late for such an allegation. Petitioner argues that respondent's case brief on this topic is purely post hoc. Therefore, petitioner maintains that the Department should allocate respondent's export selling expenses solely to respondent's export sales.

Respondent contends that the verification report is incorrect with regard to its assertion that respondent understated its farm-level U.S. indirect selling expenses. The verification report states that respondent should have used the export sales revenue specific to respondent, not the sales revenue of its two related companies in the denominator of the ratio used to allocate farm-level selling expenses to roses. However, respondent argues that the total indirect expenses incurred by the above-three companies were incurred in respondent's central office. Respondent maintains that it was not possible to isolate farm- or product-specific selling expenses from the total selling expenses incurred at the central office. Respondent further maintains that the central office provides selling support functions for all products sold by all entities in the Group. Therefore, respondent calculated the ratio used to determine the portion of total selling expenses allocable to roses by including revenue from sales of all products from all three companies in the ratio's denominator. Respondent contends that if it had only used sales revenue from the products sold by respondent, it would have overstated, not understated, the amount of the total selling expenses allocable to roses. Respondent argues, therefore, that the Department should accept respondent's verified data for the final determination.

DOC Position

We agree with respondent and have used respondent's allocation methodology and the verified information for purposes of the final determination. *See e.g., Minivans.*

Comment 47

Petitioner argues that respondent incorrectly excluded all selling expenses allocable to Sunburst New York. Petitioner contends that there is no evidence on the record that supports respondent's claim that Sunburst New York's selling expenses should be excluded because it only handled imports from the Netherlands. Petitioner argues that the evidence on the record indicates that Sunburst New York charged Sunburst Miami for freight forwarding fees, which suggests that imports from Ecuador or Colombia, rather than Holland, were sold by Sunburst New York. Petitioner argues that absent evidence concerning purchases and sales by Sunburst New York, the record does not support exclusion of Sunburst New York's selling expenses.

Respondent maintains that Sunburst New York is a separate corporate entity, wholly-owned by Sunburst Farms Miami, which acts exclusively as an importer and freight forwarder of Dutch flowers. Sunburst New York does not make any sales of Dutch flowers, all such sales are made by Sunburst Farms Miami's Holland sales department. Respondent contends that the freight forwarding fees charged by Sunburst New York to Sunburst Farms Miami are intracompany fees to reimburse Sunburst New York for its freight forwarding operations and are, thus, unrelated to sales of subject merchandise.

DOC Position

We agree with respondent. At verification, we found that Sunburst Farms had a separate sales department that dealt solely with products imported from Holland. Therefore, we find that respondent appropriately excluded Sunburst New York's selling expenses from its allocation.

Comment 48

Petitioner argues that the Department should correct home market indirect selling expenses based on verification.

Respondent did not address this issue.

DOC Position

We agree with petitioner. We corrected home market indirect selling expenses to reflect findings at verification. *See, e.g., Minivans.*

Comment 49

Petitioner states that, according to the cost verification report, fixed costs incurred with respect to packing were excluded from the calculated cost of production. Petitioner contends that there is no basis to conclude that these costs should be treated as packing expenses solely because the depreciation and insurance costs were related to the post harvest areas. Petitioner argues that, regardless of whether or not these costs were ''post-harvest,'' they should be treated as cultivation costs and added to overhead.

Respondent states that it removed fixed overhead costs related to packing from its packing calculation pursuant to the Department's instructions prior to verification. However, respondent maintains that these costs relate to functions such as hydration and grading, which are associated with packing costs and have nothing to do with production. Therefore, respondent argues these costs should not be included in its cost of cultivation and are most appropriately classified as packing costs.

DOC Position

We agree with respondent that these are packing costs. In our August 2, 1994, questionnaire, we requested that respondent remove fixed costs from its packing expenses. At that time we thought it appropriate to classify these expenses as part of COP. However, during the cost verification, we analyzed these costs and determined that it was appropriate to include these expenses in packing.

Comment 50

Petitioner states that, according to the verification report, respondent excluded year-end adjustments to farm specific G&A of: (1) Amortization of pre-operating expenses, and (2) reduction for an over accrual of social benefits.

Regarding pre-operating expenses, petitioner argues that respondent should include all amortized pre-operating expenses in G&A following normal company accounting practices absent evidence that the expenses were incurred with respect to operations other than rose production.

Regarding the over-accrual of social benefits, petitioner states that the verification report is unclear as to whether there is evidence that there is a basis for departing from the financial statements. Absent such evidence, petitioner argues that the financial statement figures should be used.

Regarding the over-accrual of social benefits, respondent contends that at year-end, it adjusted its social benefits costs to reflect the actual social benefits paid during the year. Respondent states that the costs reported to the Department included the over-accrual. Therefore, the subtraction of the amount of the over-accrual from G&A expenses noted in the verification report should be made.

DOC Position

We agree with petitioner. We found at verification that these items are G&A expenses of the company and made an adjustment. This verified data was used in our final determination. *See, e.g., Minivans.*

Comment 51

Petitioner argues that respondent's per unit G&A expenses were understated. Petitioner contends that the percentage G&A factor was applied to the reported cultivation costs, excluding the post harvest costs. Petitioner maintains that the Department should correct this error so that the cost of production and constructed value reflect full costs.

DOC Position

We agree with petitioner. The application of the G&A ratio resulted in an understatement of this expense. Therefore, for our final determination we corrected this by applying the ratio on the same basis upon which it was calculated.

Comment 52

Petitioner argues that income from exchange-rate gains on sales, insurance reimbursement, gains on sales of fixed assets, and income from social security cannot be allowed to offset respondent's interest expenses unless these income items are linked to the interest expenses deducted.

Respondent argues that income from exchange-rate gains on sales, insurance reimbursement, and gains on sales of fixed assets are related to production or has been generated from short-term investments of working capital and are, therefore, allowable as offsets to its financial expenses.

DOC Position

We agree with petitioner that these are not properly offsets to financial expenses. However, the insurance reimbursement and gains on sales of fixed assets, while not a financial expense of the company, do reflect items of a G&A nature. Accordingly, we have included them as such in our calculations.

Comment 53

Petitioner argues that Sunburst Farm's interest revenue on late accounts should be corrected as per the verification report.

DOC Position

We agree with petitioner and used Sunburst Miami's verified interest income for purposes of our final determination. *See, e.g., Minivans.*

Comment 54

Respondent argues that, pursuant to the Department's instructions, it segregated the amount of FONIN taxes paid from its cost of cultivation and reported this amount separately. Respondent maintains that the Department verified this expense without discrepancy. Respondent contends that the Department should use the actual allocated amounts for the final. Additionally, respondent argues that the Department should deduct from cost of cultivation the amount of FONIN tax originally reported.

Petitioner maintains that, to the extent the Department verified the revised FONIN tax, these amounts are appropriately deducted from USP.

DOC Position

We agree with petitioner and respondent in part. We deducted the verified amounts of FONIN tax from USP. We also deducted the FONIN tax reported in COP.

Comment 55

Respondent maintains that the Department should accept the corrections it submitted in its revised sales tape for purposes of the final determination. Additionally, respondent argues that the Department should use the verified interest expense Sunburst paid during the POI rather than the reported percent.

Petitioner contends that the Department should verify that the corrections respondent reportedly changed concerning foreign inland freight, U.S. inland freight, quality credits, U.S. indirect selling expenses, interest revenue, air freight, brokerage and handling, and packing cost were properly implemented.

DOC Position

We agree with both parties. We have reviewed the new sales listing and found that respondent made the changes as per the verification report. Therefore, used these revised expenses in our calculations. In addition, we used respondent's revised U.S. interest rate.

Suspension of Liquidation

In accordance with 19 U.S.C. 1673b, we are directing the Customs Service to continue to suspend liquidation of all entries of fresh cut roses from Ecuador, as defined in the ''Scope of Investigation'' section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. The Customs Service shall require a cash deposit or the posting of a bond on all entries equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to this investigation exceeds United States price as shown in the table below. The margins are as follows:

Manufacturer/Producer/Exporter	Margin (percent)
Arbusta-Agritab (and its related farms Agrisabe, Agritab, and Flaris)	5.38
Florin S.A. (and its related farms Cuentas En Participacion Florinsa-Ertego (Florinsa Cotopaxi) and Exflodec)	84.72
Guanguilqui Agro Industrial S.A. (and its related farm Indipasisa)	14.24
Inversiones Floricola S.A. (and its related farm Flores Mitad Del Mundo S.A.)	4.63
All Others	6.32

ITC Notification

In accordance 19 U.S.C. 1673d(d) we have notified the ITC of our determination.

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective order (APO) in this investigation of their responsibility covering the return or destruction of proprietary information disclosed under APO in accordance with 19 C.F.R. 353.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant 19 U.S.C. 1673d(d) and 19 C.F.R. 353.20(b)(2).

Dated: January 26, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–2607 Filed 2–3–95; 8:45 am]

BILLING CODE 3510–DS–P

[C–791–001]

Ferrochrome From South Africa; Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of Countervailing Duty Administrative Review.

SUMMARY: On November 12, 1993, the Department of Commerce (the Department) published in the **Federal Register** its preliminary results of administrative review of the countervailing duty order on ferrochrome from South Africa for the period January 1, 1991, through December 31, 1991. We have now completed this review and determine the bounty or grant to be zero for Consolidated Metallurgical Industries, Ltd. (CMI), and 0.81 percent *ad valorem* for all other companies.

EFFECTIVE DATE: February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Dana S. Mermelstein or Maria P. MacKay, Office of Countervailing Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–0984/2786.

SUPPLEMENTARY INFORMATION:

Background

On November 12, 1993, the Department published in the **Federal Register** the preliminary results of its administrative review of the countervailing duty order on ferrochrome from South Africa (46 FR 21155, April 9, 1981). The Department has now completed this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

We invited interested parties to comment on the preliminary results. On December 13, 1993, a joint case brief was submitted by Chromecorp Technology (Pty) Ltd., CMI, Ferralloys Limited, Middleburg Steel and Alloys (Pty) Ltd. (MS&A), and Samancor, the South African producers which exported ferrochrome to the United States during the review period (respondents). We returned respondents' brief because it contained untimely new factual information. *See* 19 CFR 355.31(a)(1)(ii). The Department has not considered the rejected new factual information for these final results of review. *See* 19 CFR 355.31(a)(3), 355.3(a). On December 21, 1993, respondents resubmitted a revised case brief. The comments addressed in this notice were presented in the resubmitted case brief.

At the request of respondents, the Department held a public hearing on December 28, 1993. On January 14 and January 16, 1994, respondents submitted two documents containing unsolicited written argument. The regulations (19 CFR 355.38) require written argument to be submitted in accordance with the deadlines and requirements for case briefs and rebuttal briefs. The two submissions in question were made after these deadlines. These submissions were returned to respondents in accordance with the regulations (19 CFR 355.38(a)). The Department has therefore not considered the arguments presented in these two submissions for purposes of reaching these final results of review.

The review covers the period January 1, 1991 through December 31, 1991. The review involves five companies and the following programs:

(1) Industrial Development Corporation Loans

(2) Export Incentive Program

(3) Regional Industrial Development Incentives

(4) Preferential Rail Rates

(5) Government Loan Guarantees

(6) Beneficiation Allowances—Electric Power Cost Aid Scheme

(7) General Export Incentive Scheme

After consideration of respondents' comments on the preliminary results of review, the Department has now recalculated the bounties or grants attributable to the Category D Scheme of the Export Incentive Program, and to the Industrial Development Corporation long-term loan program. The Department now determines the bounty or grant attributable to the Category D Scheme to be zero percent *ad valorem* for CMI, and 0.29 percent *ad valorem* for all other companies, and the bounty or grant attributable to the Industrial Development Corporation loan to be zero for CMI, and 0.05 percent *ad valorem* for all other companies. Accordingly, the Department determines the total bounty or grant from all programs under review to be zero for CMI, and 0.81 percent *ad valorem* for all other companies.

Scope of Review

Imports covered by this review are shipments of ferrochrome, which is currently classifiable under item 7202.41.00, 7202.49.10 and 7202.49.50 of the *Harmonized Tariff Schedule* (HTS). The HTS item numbers are provided for convenience and Customs

purposes. The written description remains dispositive.

Calculation of Country-Wide Rate

We calculated the bounty or grant on a country-wide basis by first calculating the bounty or grant for each company subject to the administrative review. We then weight-averaged the bounty or grant received by each company using as the weight its share of total South African ferrochrome exports to the United States, including all companies, even those with *de minimis* or zero bounties or grants. We then summed the individual companies' weight-averaged bounties or grants to determine the bounty or grant from all programs benefitting ferrochrome exports to the United States. Since the country-wide rate calculated using this methodology was above *de minimis*, as defined by 19 CFR 355.7 (1994), we proceeded to the next step and examined the total bounty or grant calculated for each company to determine whether individual company rates differed significantly from the weighted-average country-wide rate, pursuant to 19 CFR 355.22(d)(3). One company, CMI, had a bounty or grant of zero during the review period, which is significantly different pursuant to 19 CFR 355.22(d)(3). This company is treated separately for assessment purposes. All other companies are assigned the country-wide rate.

Analysis of Comments

Comment 1: Respondents argue that the Department incorrectly calculated Category D benefits because it was demonstrated at verification that Category D benefits were tied to exports to countries other than the United States. Respondents argue that their Category D benefits were tied in one of the following three ways: (1) There were no exports to the United States of the subject merchandise during the tax year covered by the tax return filed during the review period; therefore, there could be no expenses (and no tax deduction) relating to marketing U.S. exports; (2) marketing expenses were segregated as they were incurred, and only expenses relating to non-U.S. exports were claimed as a tax deduction; or (3) expenses were apportioned on a pro-rata basis, therefore the tax deduction had been adjusted downward as a result of the removal of the portion of marketing expenses determined to relate to U.S. exports. Respondents argue that, in accordance with the proposed regulations, the Department cannot countervail benefits which do not relate to exports of the subject merchandise to the United States. *See, Notice of Proposed Rulemaking and Request for Public Comments* (54 FR 23366, 23384; May 31, 1989) (*Proposed Regulations*) at § 355.47(b).

Department's Position: We recognize that to the extent that respondents segregated their marketing expenses as they were incurred, and claimed the Category D deduction only on expenses related to non-U.S. exports, Category D benefits do not benefit exports of ferrochrome to the United States. Since we were able to verify that some companies did segregate their expenses in this manner, for certain expense items claimed, we did not include in our calculations benefits attributable to these expense items.

We do not agree, however, that solely because a company did not export to a specific market during a particular period, one can necessarily conclude that the company did not incur marketing expenses related to that market. In the instant case, however, the company in question demonstrated at verification that the expenses that it claimed under this program consisted only of commissions and warehousing expenses, which can be tied to sales to a particular export market. Therefore, we agree that, in this particular case, where the company did not export the subject merchandise to the United States during the tax year, it also did not incur or claim any marketing expenses with respect to the U.S. market for subject merchandise. As such, we conclude that Category D was not used by this company with respect to its U.S. exports of ferrochrome.

In the absence of a Government of South Africa mandate prohibiting Category D claims for marketing expenses tied to U.S. exports, the pro-rata apportionment of expenses which are not directly tied to specific export sales or markets is not an adequate substitute for the direct tying of the expenses to specific sales or markets for the purpose of the Department's analysis. Therefore, we do not recognize pro-rated expenses as being tied to particular markets, or markets other than the United States. We also note that some respondents did not pro-rate or otherwise adjust certain expenses, to exclude expenses directly incurred for the U.S. market, before claiming the expenses, in their entirety, as a tax deduction under Category D. Therefore, we have included all such expenses in our calculations.

Accordingly, we have adjusted our preliminary calculations to include only those Category D benefits which arose from marketing expenses which were either pro-rated or not adjusted by the companies in making their Category D claims on the tax return filed during the review period. For further discussion of the Department's position on the tying of benefits, *see* Memorandum for the File, dated December 16, 1994; ''Tying of Benefits,'' which is on file in the Central Records Unit (Room B099 of the Main Commerce Building). We now determine the bounty or grant attributable to Category D to be zero percent *ad valorem* for CMI and 0.29 percent *ad valorem* for all other companies.

Comment 2: CMI argues that it could not have derived any benefit from the Category D program because it was in a tax loss position during the period of review (POR). Therefore, the company could not have experienced any cash-flow effect from the deduction of export marketing expenses claimed under Category D. CMI argues that the Department has previously held that a company in a tax loss position cannot benefit from an otherwise countervailable tax deduction. *See, Preliminary Negative Countervailing Duty Determinations; Certain Steel Products from South Africa* (58 FR 47865, September 13, 1993); *Final Negative Countervailing Duty Determinations; Certain Steel Products from South Africa* (58 FR 62100, November 24, 1993).

Department's Position: The Department's ''Proposed Regulations,'' at § 355.41(i)(1), state: ''[a] countervailable benefit exists to the extent the Secretary determines that the taxes paid by a firm are less than the taxes it otherwise would have paid * * *'' (54 FR 23336, 23382, May 31, 1989). Because CMI was in a tax loss position, no taxes were due during the POR. In addition, the magnitude of the tax loss alone shows that it was not created during the POR by the use of the Category D program. Therefore, we agree with respondent that CMI derived no benefit from the Category D tax deduction it took during the POR.

Comment 3: Two respondents, Samancor and Ferralloys, Ltd., argue that the Department erroneously countervailed benefits from Category A and B promissory notes issued prior to the review period which matured during the review period. Respondents claim that because these notes were discovered during the verification in discussions with government officials, and after verification at the companies' offices, the Department must request and consider information from the companies. Respondents claim that this information would reveal that one of these promissory notes does not exist and that the other two are not fully attributable to exports of subject merchandise to the United States.

Department's Position: Section 776 of the Act provides that if the Department ''is unable to verify the accuracy of the information submitted, it shall use the best information available (BIA) to it as the basis for its action.'' During verification, the Department verifiers learned of a government practice of paying benefits under Categories A and B of the General Export Incentive Scheme with promissory notes. The Department verified the promissory note practice both at the companies and the government. However, after completing verification at the companies' offices, the verifiers discovered at the government offices several promissory notes which had been issued to Samancor and Ferralloys in accordance with this practice as payment of benefits under Categories A and B of the General Export Incentive Scheme. Although the Department had previously found the Categories A and B programs countervailable (*see Ferrochrome from South Africa; Final Results of Countervailing Duty Administrative Review* (56 FR 33254; July 19, 1991)), these notes had been neither reported in the questionnaire responses nor presented at verification by the companies as Categories A and B benefits.

While the Department has determined that the omission from the questionnaire responses of information about the promissory note practice is not a sufficient basis to question the reliability of the entire response, with regard to benefits from the Categories A and B programs, the inconsistencies at verification between the information presented by the government and the information presented by the companies is a sufficient basis for Department to rely on BIA. Since the only information on the record regarding these promissory notes is the information collected at verification at the government, the Department decided to use it as BIA in the preliminary results, and has not changed that determination for these final results.

With regard to the respondents' request that the Department solicit additional information about the promissory notes, the appropriate time for submission of information on benefits received was in the questionnaire responses, or prior to the deadline for the timely submission of factual information (the earlier of 180 days from initiation of the administrative review or issuance of the preliminary results of review)(see 19 CFR 355.31(a)(1)(ii)). In this instance, that information could have been presented even at verification, when the Department accepted newly- presented information about the promissory note practice and the benefits conferred by these promissory notes in particular. The purpose of verification is to determine that submitted information has been completely and accurately reported. Further explanation of these notes after verification would involve consideration by the Department of information that the Department did not have the opportunity to verify.

Comment 4: Samancor argues that the Department should not treat the Industrial Development Corporation (IDC) loan that Middleburg Steel and Alloys (MS&A) received as a long-term loan, but as a short-term loan of nine months' duration because Barlow Rand, Ltd., the parent company of MS&A, sold the ferrochrome operation to Samancor during the review period, but retained the loan obligation. Samancor further argues that in the calculation of benefits from the fixed-rate portion of the loan, the Department should have used as its benchmark the 3-year Eskom rate, rather than the Company Loan Securities rate. Respondent argues that if the appropriate benchmark and short-term loan methodology are used, no countervailable benefit results from the fixed-rate portion of the loan. Respondent argues further that, if the Department persists in using the long-term loan methodology and the company loan securities rate as the benchmark, the Department must correct significant errors made in the calculations.

Department's Position: The IDC loan in question is a long-term loan because, when issued, the loan had a term of 7 years. The type of bounty or grant did not change as a result of events affecting the company's corporate structure. As a result of the sale of MS&A during the POR, and the retention of this loan liability by MS&A's parent after the sale, MS&A was only responsible for making interest and principal payments on the loan for 9 months during the review period; however, this does not change the terms of the loan, from a long-term loan to a short-term loan. Therefore, we apply the long-term loan methodology (as outlined in the Proposed Regulations (54 FR 23366, 23384)) to measure the benefit to MS&A for those nine months.

In the absence of contemporaneous commercial borrowing by the company, and consistent with the *Proposed Regulations* (§ 355.44(b)(4)(iv), 54 FR at 23380), the Department used as the benchmark the Company Loan Securities rate, a national average long-term rate as reported in the Quarterly Bulletin of the South African Reserve Bank. With regard to the use of the 3-year Eskom rate as a benchmark, the Department did not adopt it for two reasons. First, this rate is only a 3-year rate, and the loan's term is 7 years. Second, this rate does not represent the cost of commercial borrowing in South Africa, but the rate at which the government-owned power company raises capital by issuing 3-year bonds. Therefore, it is an inappropriate benchmark for purposes of this analysis.

We have, however, corrected the calculations for the errors noted by respondents. As a result, we determine the bounty or grant attributable to the IDC loan program to be zero for CMI and 0.09 percent *ad valorem* for all other companies.

In our preliminary results, we found that the corporate restructuring resulted in the loan no longer being subject to review and stated we would not include in our calculation of the rate of cash deposit of estimated countervailing the bounty or grant conferred by this loan. However, in these final results, we have determined that neither the corporate restructuring, nor the subsequent repayment of the loan during the period of review, meet the requirements for a program-wide change as articulated in § 355.50 of the Department's *Proposed Regulations*. The *Proposed Regulations* define a program-wide change as ''(1) [n]ot limited to an individual firm or firms; and (2) [e]ffectuated by an official act such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree''(54 FR at 23385). Because the Department has no verified information indicating that the Industrial Development Corporation loan program has been terminated, there is no reason to remove this amount from the cash deposit rate. Accordingly, no adjustment has been made to the cash deposit rate for this program in these final results. However, since we verified that Categories A and B have been terminated, and there are no residual benefits, we are adjusting the cash deposit rate to reflect this program-wide change.

Final Results of Review

As a result of our review, we determine the total bounty or grant to be zero for CMI, and 0.81 percent *ad valorem* for all other companies for the period January 1, 1991 through December 31, 1991. The bounty or grant attributable to each program is as follows:

Program	Ad valorem rate
Category D	0.29
Category A & B (Promissory Notes)	0.44
Regional Incentives:	
Labor Program	0.01
Interest Program	0.01
Housing Program	0.01
DC Loan Program	0.05
Total	0.81

Therefore, the Department will instruct the Customs Service to assess countervailing duties of zero for shipments from CMI, and 0.81 percent *ad valorem* on all other shipments from South Africa of the subject merchandise exported on or after January 1, 1991 and on or before December 31, 1991.

Further, as a result of removing from the countervailing duty rate the bounty or grant conferred by the Category A and B programs, we determine the cash deposit rate of estimated countervailing duties to be 0.37 percent *ad valorem*. This rate is *de minimis* as defined by 19 CFR 355.50. Therefore, as provided for by section 751(a)(1) of the Act, the Department will instruct the Customs Service to collect cash deposits of estimated countervailing duties of zero for all shipments of the subject merchandise from South Africa entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 CFR 355.22).

Dated: January 31, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–2854 Filed 2–3–95; 8:45 am]

BILLING CODE 3510–DS–P

National Oceanic and Atmospheric Administration

[I.D. 011195A]

Marine Mammals; Small Takes of Marine Mammals Incidental to Specified Activities

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of issuance of an incidental harassment authorization.

SUMMARY: In accordance with provisions of the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization to take small numbers of harbor seals by harassment incidental to the nonexplosive demolition of the Still Harbor Dock Facility on McNeil Island in southern Puget Sound has been issued to the Washington State Department of Corrections (WDOC).

EFFECTIVE DATE: This authorization is effective from 0001 hours January 20, 1995 until 2400 hours January 19, 1996.

ADDRESSES: The application and authorization are available for review in the following offices: Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 and the Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115.

FOR FURTHER INFORMATION CONTACT: Kenneth Hollingshead, Marine Mammal Division, Office of Protected Resources at 301–713–2055, or Brent Norberg, Northwest Regional Office at 206–526–6733.

SUPPLEMENTARY INFORMATION: Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq*.) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.

Permission may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s); will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses; and the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth.

On April 30, 1994, the President signed Public Law 103–238, the Marine Mammal Protection Act Amendments of 1994. One part of this law added a new subsection 101(a)(5)(D) to the MMPA to establish an expedited process by which citizens of the United States can receive an authorization, without regulations, to incidentally take small numbers of marine mammals by harassment. New subsection 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

On August 18, 1994, the WDOC applied for an authorization under section 101(a)(5)(D) of the MMPA, for the take of a small number of harbor seals by harassment incidental to the demolition of the existing dock facility and the driving of approximately 152 concrete, plastic, and steel piles (90 concrete, 40 plastic, and 22 steel) of the Still Harbor Dock Facility on McNeil Island in southern Puget Sound, WA. Notice of receipt of the application and the proposed authorization was published on November 8, 1994 (59 FR 55639) and a 30-day public comment period was provided on the application and proposed authorization. In addition, an Environmental Assessment (EA) was prepared for this action by NMFS and made available at that time. During the comment period, one comment was received. The Marine Mammal Commission recommended that the proposed small take exemption not be issued until the uncertainties and details of the monitoring program have been worked out and NMFS is able to reasonably conclude that the (monitoring) program is appropriate to detect any possible harmful effects on the local harbor seal population. In part as a result of this comment, a condition of the Incidental Harassment Authorization is for WDOC to notify both NMFS and the Washington Department of Fish and Wildlife (WDFW) at least 48 hours prior to commencement of work in order to allow observations of harbor seals prior to work beginning. To ensure that observations take place during demolition work, if NMFS and/or WDFW biologists are not available during demolition, the WDOC is required to contract for behavioral observations to be made during any work on the McNeil Island Dock. The Commission also questioned the scheduling of the proposed activities and noted that while documentation states that ''[t]he dock removal and construction schedules were developed to avoid reproductively sensitive life history periods of several species of wildlife, including harbor seals'' the documents did not indicate what other wildlife species were considered or discussed. As a result, the Commission was concerned that they were not able to determine whether the proposed authorization would meet the requirements of section 101(a)(5)(D)(ii) of the MMPA. As explained to the Commission, these other species were not discussed in the EA because they were discussed in the Environmental

Impact Statement prepared by the WDOC (which was incorporated by reference into the EA). It should be noted that the dock construction schedule was developed by the applicant in cooperation with the WDFW to ensure the least impact on the various protected species. Once NMFS was assured that the taking would not result in more than the harassment (as defined by the MMPA Amendments of 1994) of a small number of harbor seals, would have a negligible impact on the species, and would result in the least practicable impact on the stock, NMFS determined that the requirements of section 101(a)(5)(D) had been met and the authorization could be issued.

Additional background information on the activity and request can be found in the notice of receipt and proposed authorization (59 FR 55639, November 8, 1994) and need not be repeated here.

Dated: January 30, 1995.

Patricia A. Montanio,

Acting Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 95–2748 Filed 2–3–95; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF EDUCATION

[CFDA No. 84.031A, CFDA No. 84.031G]

Closing Date for Receipt of Applications for Designation as an Eligible Institution for Fiscal Year (FY) 1995 for the Strengthening Institutions and Endowment Challenge Grant Programs

The Department of Education published a notice in the **Federal Register** of December 6, 1994 (59 FR 62964–62966) that established January 23, 1995 as the closing date for the submission of applications to be designated as an eligible institution under the Strengthening Institutions and Endowment Challenge Grant programs for Fiscal Year 1995. The Department is reopening and extending the application period to March 27, 1995 because the requisite application forms will not be available until February 21, 1995.

FOR APPLICATIONS OR INFORMATION CONTACT: Strengthening Institutions Program Branch, Division of Institutional Development, U.S. Department of Education, 600 Independence Avenue, S.W., Suite 600, Portals Building, Washington, D.C. 20202–5335. Telephone: (202) 708–8839. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Information about the Department's funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department's electronic bulletin board (ED Board), telephone (202) 260–9950; or on the Internet Gopher Server at GOPHER.ED.GOV (under Announcements, Bulletins and Press Releases). However, the official application notice for a discretionary grant competition is the notice published in the **Federal Register**.

Program Authority: 20 U.S.C. 1057, 1059c and 1065a.

Dated: January 30, 1995.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 95–2765 Filed 2–3–95; 8:45 am]

BILLING CODE 4000–01–P

Advisory Council on Education Statistics; Meeting

AGENCY: Advisory Council on Education Statistics.

ACTION: Teleconference.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Advisory Council on Education Statistics. This notice also describes the functions of the Council. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATES AND TIME: February 13, 1995 at 10:00 a.m.

ADDRESSES: 555 New Jersey Avenue, NW., room 400F, Washington, DC 20208.

FOR FURTHER INFORMATION CONTACT: Barbara Marenus, Executive Director, Advisory Council on Education Statistics, 555 New Jersey Avenue, room 400J, Washington, DC 20208–7575, telephone: (202) 219–1839.

SUPPLEMENTARY INFORMATION: The Advisory Council on Education Statistics (ACES) is established under Section 406(c)(1) of the Education Amendments of 1974, Pub. L. 93–380. The Council is established to review general policies for the operation of the National Center for Education Statistics (NCES) in the Office of Educational Research and Improvement and is responsible for advising on standards to insure that statistics and analyses disseminated by NCES are of high quality and are not subject to political influence. The meeting of the Council is open to the public.

The proposed agenda includes the following:

- A discussion of draft NCES guidelines on standards-based reporting.
- Discussion of the Council's new legislated responsibilities.
- Expanding the membership of the Council.

Records are kept of all Council proceedings and are available for public inspection at the Office of the Executive Director, Advisory Council on Education Statistics, 555 New Jersey Avenue NW., room 400J, Washington, DC 20208–7575.

Sharon P. Robinson,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 95–2778 Filed 2–3–95; 8:45 am]

BILLING CODE 4000–01–M

Indian Education National Advisory Council; Meeting

AGENCY: National Advisory Council on Indian Education, Education.

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Advisory Council on Indian Education. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATES: February 11, 1995 from 9 a.m. to 5 p.m. or until the conclusion of business.

ADDRESSES: The meeting will be held at the Quality Inn Capitol Hill, 415 New Jersey Avenue, NW., Washington, DC, (202) 638–1616.

FOR FURTHER INFORMATION CONTACT: John W. Cheek, Acting Director, National Advisory Council on Indian Education, 330 C Street, SW., room 4072, Switzer Building, Washington, DC 20202–7556. Telephone: (202) 205–8353.

SUPPLEMENTARY INFORMATION: The National Advisory Council on Indian Education is established under section 5342 of the Indian Education Act of 1988 (25 U.S.C. 2642). The Council is established to, among other things, assist the Secretary of Education in carrying out responsibilities under the Indian Education Act and to advise Congress and the Secretary of Education with regard to federal education programs in which Indian children or adults participate or from which they can benefit.

The Chairman of the National Advisory Council on Indian Education

has called a meeting of the National Advisory Council on Indian Education subcommittee chairs for Saturday, February 11, 1995. These committees include Publications, Oversight on Education, Tribal Languages, American Indian/Alaska Natives in Public Education, Legislative, and Tribal Community Relations committees. The agenda will include a briefing on the American Indian/Alaska Native Education Summit being planned for March 20–22, 1995 in Washington, DC. NACIE, as one of the co-sponsors for the Summit, will utilize its subcommittees in planning the agenda for one day of the Summit.

The public is being given less than 15 days notice due to problems in scheduling this meeting.

Records shall be kept of all Council proceedings and are available for public inspection at the office of the National Advisory Council on Indian Education located at 330 C Street SW., room 4072, Washington, DC 20202–7556 from the hours of 9 a.m. to 4:30 p.m. Monday through Friday, except holidays.

Dated: February 1, 1995.

John W. Cheek,

Acting Director, National Advisory Council on Indian Education.

[FR Doc. 95–2895 Filed 2–3–95; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Environmental Management Site Specific Advisory Board, Savannah River Site; Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site Specific Advisory Board (EM SSAB), Savannah River Site.

DATES AND TIMES: Tuesday, February 21, 1995; 10:00 a.m. to 12:00 noon.

ADDRESSES: The board meeting will be held at: Barnwell County Museum, Marlboro Avenue, Barnwell, South Carolina.

FOR FURTHER INFORMATION CONTACT: Tom Heenan, Manager, Environmental Restoration and Solid Waste, Department of Energy Savannah River Operations Office, P.O. Box A, Aiken, S.C. 29802 (803) 725–8074.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

10:00 a.m.—Budget Issues

12:00 p.m.—Adjourn

If needed, time will be allotted after public comments for items added to the agenda, and administrative details.

A final agenda will be available at the meeting Tuesday, February 21, 1995.

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Tom Heenan's office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provisions will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available by writing to Tom Heenan, Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29802, or by calling him at (803) 725–8074.

Issued at Washington, DC on February 1, 1995.

Rachel Murphy Samuel,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 95–2846 Filed 2–3–95; 8:45 am]

BILLING CODE 6450–01–P

Office of Energy Research

High Energy Physics Advisory Panel; Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770), notice is hereby given of the following meeting: High Energy Physics Advisory Panel (HEPAP).

DATES: March 2, 1995; 9:00 a.m.–5:00 p.m.; March 3, 1995; 9:00 a.m.–4:00 p.m.

ADDRESS: U.S. Department of Energy, 1000 Independence Avenue, SW., room 1E–245, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Dr. Enloe T. Ritter, Executive Secretary, High Energy Physics Advisory Panel, U.S. Department of Energy, ER–221, GTN, Washington, DC 20585, telephone: (301) 903–4829.

SUPPLEMENTARY INFORMATION:

Purpose of Panel: To provide advice and guidance on a continuing basis with respect to the high energy physics research program.

Tentative Agenda

Thursday, March 2, 1995 and Friday, March 3, 1995:

—Discussion of Department of Energy (DOE) High Energy Physics Programs and Budget
—Discussion of National Science Foundation (NSF) Elementary Particle Physics Programs and Budget
—Discussion of Status of Large Hadron Collider (LHC) Project and Possible U.S. Participation in LHC
—Discussion of Impact of FY 1996 Budget Request on High Energy Physics Laboratories and their Programs
—Reports on and Discussions of Topics of General Interest in High Energy Physics
—Public Comment (10 minute rule)

Public Participation: The meeting is open to the public. The Chairperson of the Panel is empowered to conduct the meeting in a fashion that will, in his judgment, facilitate the orderly conduct of business. Any member of the public who wishes to make oral statements pertaining to agenda items should contact the Executive Secretary at the address or telephone number listed above. Requests must be received at least 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Minutes: Available for public review and copying at the Public Reading Room, Room 1E–190, Forrestal Building, 1000 Independence Avenue, S.W., Washington, DC between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on February 1, 1995.

Rachel Murphy Samuel,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 95–2847 Filed 2–3–95; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket Nos. ER95–203–001 and ER95–216–001]

UtiliCorp United Inc., Aquila Power Corporation; Filing

January 26, 1995.

Take notice that on January 18, 1995, UtiliCorp United Inc. (UtiliCorp), tendered for filing information concerning the facilities owned or controlled by its West Virginia Power division as required by the January 13, 1995 order in these proceedings. UtiliCorp has requested that the Commission act expeditiously on the filing and that an order be issued on the compliance filing by February 7, 1995.

A copy of the filing was served on each party to these proceedings and the Public Service Commission of the State of West Virginia.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before February 9, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2771 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP95–179–000]

Havre Pipeline Company, LLC; Application for Authorization To Operate Border Facilities and for Presidential Permit

January 31, 1995.

Take notice that on January 18, 1995, Havre Pipeline Company, LLC (Havre), 410 17th Street, Suite 1400, Denver, Colorado, 80802, filed an application pursuant to Section 3 of the Natural Gas Act, Sections 153.10 through 153.12 of the Commission's regulations, and Executive Order No. 10485, as amended by Executive Order No. 12038 and Secretary of Energy Delegation Order No. 0204–112 for Section 3 authorization and a Presidential Permit to own, operate, and maintain pipeline facilities at the United States-Canada International Boundary, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Havre seeks authorization to own, operate, and maintain existing facilities at the United States-Canada border near Willow Creek, Saskatchewan, consisting of a 16-inch, 46-mile pipeline and appurtenant facilities. Havre intends to provide border transportation services for gas imported by and exported by its shippers.

Any person desiring to be heard or to make any protest with reference to said application should on or before February 21, 1995, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2754 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP93–99–006]

Colorado Interstate Gas Company; Tariff Filing

January 31, 1995.

Take notice that on January 26, 1995, Colorado Interstate Gas Company (CIG), tendered for filing a revised tariff sheet, to its FERC Gas Tariff, First Revised Volume No. 1.

CIG states that pursuant to the order issued November 10, 1994 (the Order), in Docket Nos. RP93–99–000, RP93–99–003 and RP93–99–004, CIG filed tariff sheets on January 4, 1995 to comply with the Order. The January 4, 1995 filing had an error on Second Substitute Fourth Revised Sheet No. 10 for the Interruptible Gathering Commodity Rate. CIG inadvertently showed a maximum rate of $0.0212 when a rate of $0.1665 should have been shown. CIG is herein filing Third Substitute Fourth Revised Sheet No. 10 to correct this error.

CIG states that a copy of this filing was served upon all parties in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). All such protests should be filed on or before February 7, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2755 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. PR94–8–000]

Louisiana Intrastate Gas Company, L.L.C.; Informal Settlement Conference

January 31, 1995.

Take notice that an informal settlement conference in the above-captioned proceeding will be held on Thursday, March 9, 1995 at 10:00 A.M. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426.

Attendance will be limited to the parties and participants, as defined by 18 CFR 385.102 (b) and (c). Persons wishing to become a party must move to intervene and receive intervenor status pursuant to § 385.214 of the Commission's regulations.

For additional information, please contact Mark E. Hegerle at (202) 208–0287.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2756 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–66–000]

ANR Pipeline Company; Technical Conference

January 31, 1995.

In the Commission's order issued December 30, 1994, in the above-captioned proceeding, the Commission held that the filing raises issues for which a technical conference is to be convened. The conference to address the issues has been scheduled for Tuesday, February 21, 1995, at 10:00

a.m. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 810 First Street, NE., Washington, DC 20426.

All interested persons and staff are permitted to attend.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2757 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–134–000]

Natural Gas Pipeline Company of America Notice of Proposed Changes in FERC Gas Tariff

January 31, 1995.

Take notice that on January 26, 1995, Natural Gas Pipeline Company of America (Natural), tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, Second Revised Sheet No. 3, Original Sheet No. 403 and Sheet Nos. 404–499 to become effective February 25, 1995

Natural states that the purpose of the filing is to add new Section 46 to the General Terms and Conditions of its tariff. The new section sets forth the standards of conduct applicable to gathering affiliates of Natural.

Natural also states that it seeks authorization to terminate services through certain non-certificated gathering facilities located in Eddy County, New Mexico in order for Natural to sell and transfer such facilities to MidCon Gas Products of New Mexico Corp., an affiliated gatherer.

Natural requested waiver of the Commission's Regulations to the extent necessary to permit the tariff sheets to become effective February 25, 1995.

Natural states that copies of the filing are being mailed to Natural's jurisdictional transportation customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before February 7, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2758 Filed 2–3–95; 8:45 am]

[Docket No. RP95–135–000]

Williams Natural Gas Co.; Notice of Termination of Certain Gathering Services

January 31, 1995.

Take notice that on January 26, 1995, Williams Natural Gas Company (WNG), filed pursuant to Section 4 of the Natural Gas Act, a Notice of Termination of Certain Gathering Services. WNG states that such termination of services is proposed to be effective on the last day of the calendar month following the calendar month in which the Commission issues a final order approving the abandonment of WNG's gathering facilities to Williams Gas Processing—Mid Continent Region Company.

WNG states that it has served copy of the notice on all parties on the official service list in Docket No. CP94–196–000 and on all current shippers on the list attached to the filing.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20406, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 395.214). All such petitions or protests should be filed on or before February 7, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2759 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–136–000]

Williams Natural Gas Company; Proposed Changes in FERC Gas Tariff

January 31, 1995.

Take notice that on January 27, 1995, Williams Natural Gas Company (WNG), tendered for filing certain revised tariff sheets to Second Revised Volume No. 1 of its FERC Gas Tariff. The proposed effective date of these tariff sheets is March 1, 1995.

WNG states that the filing proposes a change in its currently effective transportation, storage, and other rates which would result in an increase in annual revenues of approximately $28.6 million, based on the test period (the twelve months ended October 31, 1994, adjusted for known changes through July 31, 1995). The Company states that the increased rates are required to permit the Company to recover various substantial cost increases experienced by the Company, as well as to reflect changes in the mix of services being rendered to the Company and the abandonment of most of its gathering facilities. The filing also includes certain tariff modifications.

WNG states that a copy of its filing was served on each of its jurisdictional customers and affected state commissions pursuant to § 154.16(b) of the Commission's Regulations.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20406, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 395.214). All such petitions or protests should be filed on or before February 7, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2760 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–137–000]

Northern Natural Gas Company; Proposed Changes in FERC Gas Tariff

January 31, 1995.

Take notice that on January 27, 1995, Northern Natural Gas Company (Northern), tendered for filing changes in its FERC Gas Tariff, Fifth Revised Volume No. 1.

Northern states that the filing establishes the direct bill amounts by shipper resulting from the buyout of the Pan Alberta Gas (U.S.) Exchange Agreement that was turned back by Northern's customers and not assigned through the initial Reverse Auction,

pursuant to the Reverse Auction Cost Recovery Mechanism established in Northern's Global Settlement. Therefore Northern has filed Third Revised Sheet No. 68 to reflect these amounts in its Tariff and will commence billing such amounts effective March 1, 1995.

Northern states that copies of this filing were served upon the company's customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before February 7, 1995. All protests will be considered by the Commission in determining the appropriate proceeding, but will not serve to make protestant a party to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2761 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–138–000]

Granite State Gas Transmission, Inc.; Proposed Changes in FERC Gas Tariff

January 31, 1995.

Take notice that on January 27, 1995, Granite State Gas Transmission, Inc. (Granite State), filed Second Revised Sheet No. 31 in its FERC Gas Tariff, Third Revised Volume No. 1, containing changes in rates for effectiveness on February 1, 1995.

According to Granite State, the direct bill charges on Second Revised Sheet No. 31 allocate to its former sales customers, Bay State Gas Company and Northern Utilities, Inc., accumulated deferred gas costs in its A/C 191 attributable to additional out-of-period billings and credits it received from former gas suppliers during the twelve month period ending November 30, 1994. Granite State further states that during the twelve month period ending November 30, 1994, it was billed an additional $208,727.63 in demand charges by former suppliers and received credits for volumetric charges in the amount of $174,140.96 attributable to gas purchases during the months of September and October, 1993, before it commenced restructured operations on November 1, 1993. Granite State proposes to direct bill the net balance of $47,727.42, which includes carrying charges, to its former sales customers as transitional costs pursuant to Order Nos. 636, et seq.

Granite State states that copies of its filing have been served upon its customers, Bay State Gas Company and Northern Utilities, Inc., and the regulatory commissions of the States of Maine, Massachusetts and New Hampshire.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Section 211 and 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before February 7, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2762 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–139–000]

Texas Gas Transmission Corporation; Proposed Changes in FERC Gas Tariff

January 31, 1995.

Take notice that on January 27, 1995, Texas Gas Transmission Corporation (Texas Gas), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets, with an effective date of March 1, 1995:

Sixth Revised Seventh Revised Sheet No. 10
Sixth Revised Fourth Revised Sheet No. 11
Fourth Revised First Revised Sheet No. 11.1
Fourth Revised Ninth Revised Sheet No. 12

Texas Gas states that the revised tariff sheets are being filed pursuant to Section 33.3 of the General Terms and Conditions of Texas Gas's FERC Gas Tariff, First Revised Volume No. 1, to recover ninety percent (90%) of its Gas Supply Realignment costs from its firm transportation customers and ten percent (10%) of its Gas Supply Realignment Costs from its IT customers. The GSR costs, including applicable interest, proposed to be recovered by Texas Gas's fifth GSR recovery filing total $3,900,070.

Texas Gas states that copies of the revised tariff sheets are being mailed to Texas Gas's affected jurisdictional customers, those appearing on the applicable service lists, and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before February 7, 1995. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2763 Filed 2–3–95; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5150–2]

Acid Rain Program: NO_X Compliance Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Status of NO_X Compliance Plans in Final Acid Rain Permits.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is providing notice of the status of NO_X compliance plans in final Acid Rain permits that were issued prior to November 29, 1994, the date on which the U.S. Court of Appeals for the District of Columbia Circuit issued a decision vacating the Acid Rain NO_X regulations contained in part 76. Prior to November 29, 1994, EPA had issued draft NO_X compliance plans for public comment and, after the close of the public comment periods, issued final permits or permit revisions that included approved NO_X compliance plans. Under the plans, units were required to meet the standard NO_X emission limitations or the requirements of NO_X averaging plans, and some units were granted 15-month NO_X compliance extensions. The

emission limitations and compliance plan requirements were set forth in part 76.

On November 29, 1994, the U.S. Court of Appeals for the District of Columbia Circuit determined that, in promulgating part 76, the Agency had exceeded its statutory authority. The Court vacated part 76. Consequently, those NO_X compliance plans that the Agency had approved prior to November 29, 1994 are no longer in effect. The Court decision has no effect on any other provisions of the permits, including the SO_2 compliance plans. The permits containing the NO_X compliance plans are listed below. Upon reissuance of NO_X regulations, EPA will again address the status of these NO_X compliance plans.

EPA notes that there are some NO_X compliance plans that were submitted, but not acted on before November 29, 1994 or were submitted after November 29, 1994. In light of the Court's decision, the Agency has deferred action on any NO_X compliance plans that had not already been acted on by that date.

Permits for the following sources contain previously approved NO_X compliance plans for all Phase I units with Group 1 boilers located at the sources. These plans are not in effect at this time:

Dunkirk, Greenidge, and Milliken in New York.

Chalk Point and Morgantown in Maryland.

Armstrong, Bruce Mansfield, Brunner Island, Cheswick, Conemaugh, Martins Creek, New Castle, Portland, Shawville, and Sunbury in Pennsylvania.

Albright, Fort Martin, Harrison, Mitchell, and Mt Storm in West Virginia.

Colbert and E C Gaston in Alabama.

Crist in Florida.

Bowen, Hammond, Jack McDonough, Wansley, and Yates in Georgia.

Coleman, Cooper, East Bend, E W Brown, Elmer Smith, Ghent, Green River, H L Spurlock, HMP&L Station 2, and R D Green in Kentucky.

Jack Watson in Mississippi.

Gallatin and Johnsonville in Tennessee.

Baldwin, Grand Tower, Hennepin, Hutsonville, Joppa Steam, Meredosia, Newton, and Vermilion in Illinois.

Cayuga, Elmer W Stout, F B Culley, Frank E Ratts, Gibson, H T Pritchard, Petersburg, R Gallagher, and Wabash River in Indiana.

J H Campbell in Michigan.

High Bridge and Sherburne County in Minnesota

Ashtabula, Conesville, East Lake, Edgewater, Gorge, Miami Fort, Picway, R E Burger, Toronto, W H Sammis, and Walter C. Beckjord in Ohio.

Genoa, South Oak Creek, and Pulliam in Wisconsin.

Burlington, Milton L Kapp, Prairie Creek, and Riverside in Iowa.

Quindaro in Kansas.

Hawthorn, James River, Labadie, Montrose, Southwest, and Thomas Hill in Missouri.

Gadsby in Utah.

Jim Bridger (units BW71, BW72, and BW73 only) and Wyodak in Wyoming.

FOR FURTHER INFORMATION CONTACT: Contact Dwight C. Alpern, (202) 233–9151.

Dated: January 31, 1995.

Brian J. McLean,

Director, Acid Rain Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 95–2831 Filed 2–3–95; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5150–4]

Common Sense Initiative Iron and Steel Sector Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Common Sense Initiative Iron and Steel Sector Subcommittee Notice of Meeting.

SUMMARY: The Environmental Protection Agency established the Common Sense Initiative Council (CSIC)—Iron and Steel Sector Subcommittee on October 17, 1994 to provide independent advice and counsel to EPA on policy issues associated with the iron and steel industry. The charter for CSIC is authorized through October 17, 1996 under regulation of the Federal Advisory Committee Act (FACA), Public Law 92–463.

OPEN MEETING NOTICE: Notice is hereby given that the Environmental Protection Agency is convening an open meeting of the Iron and Steel Sector Subcommittee on Tuesday, February 21, 1995 from 1:00 p.m. to 5:30 p.m. at the Ramada Hotel—Old Town, 901 North Fairfax Street, Alexandria, VA 22314. Seating will be available on a first come, first served basis.

The Iron and Steel Subcommittee has created four workgroups which are responsible for proposing to the full Subcommittee for review, deliberation, and approval potential activities or projects that the Iron and Steel Sector Subcommittee will undertake, and for carrying out projects once approved. The purpose of the meeting will for the four Subcommittee workgroups to report on the progress they have made, and for the Subcommittee to review and discuss the activities or projects recommended by the workgroups, to provide further guidance as necessary, and, as appropriate, to approve projects for which detailed workplans will be subsequently developed.

INSPECTION OF SUBCOMMITTEE DOCUMENTS: Documents relating to the above topics will be publicly available at the meeting. Thereafter, these documents and the minutes of the meeting will be available for public inspection in room 2417M of EPA Headquarters, 401 M Street, SW, Washington, D.C.

FOR FURTHER INFORMATION: For more information about this meeting, please call either Ms. Judith Hecht at 202–260–5682 in Washington, D.C. or Ms. Mary Byrne at 312–353–2315 in Chicago, Illinois.

Dated: January 27, 1995.

Mahesh Podar,

Designated Federal Official.

[FR Doc. 95–2851 Filed 2–3–95; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5149–5]

Jack's Creek/Sitkin Smelting Superfund Site de Minimis Settlement; Proposed Administrative Settlement Under the Comprehensive Environmental Response, Compensation and Liability Act

AGENCY: Environmental Protection Agency.

ACTION: Request for Public Comment.

SUMMARY: The United States Environmental Protection Agency is proposing to enter into a *de minimis* settlement pursuant to Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, (CERCLA), 42 U.S.C. 9622(g)(4). This proposed settlement is intended to resolve the liabilities under CERCLA of 112 *de minimis* parties for response costs incurred by the United States Environmental Protection Agency at the Jack's Creek/Sitkin Smelting Superfund Site, Maitland County, Pennsylvania.

DATES: Comments must be provided on or before March 8, 1995.

ADDRESSES: Comments should be addressed to the Docket Clerk, United States Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania, 19107, and should refer to: In Re: Jack's Creek/Sitkin Smelting Superfund Site, Maitland County, Pennsylvania, U.S. EPA Docket No. III–94–40–DC.

FOR ADDITIONAL INFORMATION CONTACT: Daniel Isales (215) 597–4774, or Pamela

Lazos (215) 597–8504, United States Environmental Protection Agency, Office of Regional Counsel, (3RC22), 841 Chestnut Building, Philadelphia, Pennsylvania, 19107.

NOTICE OF DE MINIMIS SETTLEMENT: In accordance with Section 122(i)(1) of CERCLA, 42 U.S.C. 9622(i)(1), and Section 7003(d) of the Solid Waste Disposal Act, 42 U.S.C. 6973(d), notice is hereby given of a proposed administrative settlement concerning the Jack's Creek/Sitkin Smelting Superfund Site in Maitland County, Pennsylvania. The administrative settlement was signed by the United States Environmental Protection Agency, Region III's Regional Administrator on September 30, 1994 and is subject to review by the public pursuant to this Notice. The agreement is also subject to the approval of the Attorney General, United States Department of Justice or her designee and for the grant of a covenant not to sue for damages to natural resources, is also subject to agreement in writing by the Department of the Interior (''DOI''). Below are listed the parties who have executed binding certifications of their consent to participate in the settlement: See attached list

These 113 parties collectively agreed to pay $3,791,664.96 to the United States Environmental Protection Agency toward EPA response costs and have the option of paying $136,465.87 to DOI for damages to natural resources, subject to the contingency that the Environmental Protection Agency may elect not to complete the settlement based on matters brought to its attention during the public comment period established by this Notice.

EPA is entering into this agreement under the authority of Sections 122(g) and 107 of CERCLA, 42 U.S.C. 9622(g) and 9607. Section 122(g) of CERCLA, 42 U.S.C. 9622(g), authorizes early settlements with *de minimis* parties to allow them to resolve their liabilities under, inter alia, Section 107 of CERCLA, 42 U.S.C. 9607, to reimburse the United States for response costs incurred in cleaning up Superfund sites without incurring substantial transaction costs. Under this authority the Environmental Protection Agency proposes to settle with those potentially responsible parties at the Jack's Creek/Sitkin Smelting Superfund Site who are each responsible for less than .05% percent of the volume of hazardous substances at the Site. The grant of a covenant not to sue for damages to natural resources by DOI to those parties paying their share of such allocated costs is subject to agreement in writing by DOI pursuant to Section 122(j) of CERCLA, 42 U.S.C. 9622(j).

The *de minimis* parties listed above will be required to pay their volumetric share of the Government's past response costs and the estimated future response costs at the Jack's Creek/Sitkin Smelting Superfund Site. EPA will not know until the first payment is made which parties have chosen to settle with DOI.

The Environmental Protection Agency will receive written comments to this proposed administrative settlement for thirty (30) days from the date of publication of this Notice. Moreover, pursuant to Section 7003(d) of the Solid Waste Disposal Act, 42 U.S.C. 6973(d), the public may request a meeting in the affected area. A copy of the proposed Administrative Order on Consent can be obtained from the Environmental Protection Agency, Region III, Office of Regional Counsel, (3RC20), 841 Chestnut Building, Philadelphia, Pennsylvania, 19107 by contacting Daniel Isales at (215) 597–4774 or Pamela Lazos at (215) 597–8504.

Peter H. Kostmayer,

Regional Administrator, EPA, Region III.

Jack's Creek De Minimis Settlors

Abramson Auto Wrecking
Akron Brass
Alabama Scrap Metal Co. (Shredders)
American Totalisator Company, Inc.
Anaconda American Brass Co.
Annadale Scrap Co. (Annaco)
Arrowhead Brass Products, Inc.
Arrow-Hart, Inc. (Cooper Indust.)
Assad Iron & Metals, Inc.
AT&T
Baker Iron & Metal Co.
Berg Electronics
Brodey & Brodey
Burndy Corporation
Chrysler Corporation
Coatesville Scrap Iron & Metal Co.
Consolidated Fibres (CFI Indust.)
Continental Wire and Cable
Control Data Corp. (Ceridian Corp.)
Con-Rail
Coulter Electronics
Crescent Brass Mfg. Corp.
Culp Iron & Metal Co., Inc.
Cutler Hammer (Shallcross) (Eaton)
Digital Equipment Corp.
Douglas Battery Mfg.
Dow Chemical
Duke Power Company
Eljer Plumingware
Emil A. Schroth, Inc.
Empire Recycling Co.
Excel Products Co. Inc.
Excelsior Brass Works
E. I. De Nemours & Company
Fairchild Semiconductor
Federal Metal Company
General Battery (Exide)
GTE Information Systems
GTE Sylvania Inc.
GTI Corporation
H & D Metal Co., Inc.
Harris Corporation
Harris Semiconductor [1]
Harrisburg Waste Paper Co.
Hobart Corp.
Hodes Industries Inc.
Honeywell Information Systems
Ingersoll-Rand Company
ITT
Jacobson Metal Co. (The Union Corp.)
Joseph Freedman Co., Inc.
J.W. Harris Co. Inc.
Kane Bros. Scrap I & M
Kassab Bros.
Louisville Scrap Material Co., Inc.
M & K Metal Processors
Mallory Controls Co.
Mann Edge Tool
Mansfield Sanitary Inc.
Marlette Homes
Maryland Metals
Metal Bank of America (U.S.O.-MBA)
Metallurgical Products Co.
Metalsco Inc.
Miller Co., The
Montgomery Iron & Metal
Morris Iron & Steel Co.
Motorola, Inc.
National Nickel Alloy
New Jersey Zinc Co.
Newman, Reggie (Reggie Newman & Assoc., Inc.)
Novey's Iron & Steel
Olin Matheison
Parkwood Iron and Metal
Peck Iron & Metal Co.
Penn Central (Am. Premier Under.)
Pennsylvania Depart. of General Ser.
Pennsylvania State University
Phelps Dodge Refining Corp. and its subsidiaries [2]:
—Phelps Dodge Brass
—Phelps Dodge Copper Prod. Corp.
—Phelps Dodge Industries, Inc.
—Phelps Dodge Copper Products Company
Philadelphia Electric Co. (PECO)
PPG Industries
P.M. Refining, Inc.
Raytheon Co.
Riegel Textile Corp.
River Smelting & Refining
Riverside Metal (Root Corp.)
Robinette Scrap Metal
Roumm's Scrap Materials R.S.R.
Sabel Steel Service
Seville Centrifugal Bronze
Sheidow Bronze Corp.
Shell Chemical (Shell Oil Co.)
Smith Iron & Metal Co.
Stanley Sack Co.
State Line General Scrap Co.
Suisman & Blumenthal
Sunbury Daily Item
Superior Brass & Alum. Cast Co.
S. Kasowitz & Son
Telex Computer Products
Unisys
United Brass Works Inc.

[1] Harris Corporation signed for itself and its subsidiary, Harris Semiconductor. Harris Semiconductor was listed on the Volumetric Ranking Summary (''VRS'') as an orphan. Its share has been recalculated and had been added to the Addendum to the VRS.

[2] Unlike Harris Corporation, none of the Phelps Dodge subsidiaries were listed separately in the VRS. Therefore, they are not counted here as separate settlors.

Universal Scrap Metal Corp.
U.S. Postal Service
U.S. Steel (USX Corp.)
Watts Regulator Co.
Weatherhead Co. (Dana Corp.)
Weinstein Co. (Web-Jamestown Corp.)
West Bend Co.
Westinghouse
Wise Metals Co. Inc.
Young American Homes

[FR Doc. 95–2828 Filed 2–3–95; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board Action to Release and Discharge Receiver and Cancel Charters of the Federal Land Bank of Jackson and the Federal Land Bank Association of Jackson

AGENCY: Farm Credit Administration.

ACTION: Notice.

On January 27, 1995, the Chairman of the Farm Credit Administration Board executed FCA Board Action NV–95–04 barring claims, discharging and releasing the Receiver, and cancelling the charters of the Federal Land Bank of Jackson and the Federal Land Bank Association of Jackson arising out of the involuntary liquidation of the institutions. The text of the FCA Board Action is set forth below:

Farm Credit Administration Board Action to Release and Discharge Receiver and Cancel Charters of the Federal Land Bank of Jackson and the Federal Land Bank Association of Jackson

Whereas, the Farm Credit Administration (FCA) Board had determined that statutory grounds existed for the appointment of a receiver for the Federal Land Bank of Jackson (Jackson FLB), headquartered in Jackson, Mississippi, and the Federal Land Bank Association of Jackson (Jackson FLBA), also headquartered in Jackson, Mississippi (Liquidating Institutions), under its authority in section 4.12(b) of the Farm Credit Act of 1971, as amended, and 12 CFR 611.1156, and did place the Liquidating Institutions into receivership on May 20, 1988;

Whereas, on May 20, 1988, the FCA Board by FCA Board Action BM–17–MAY–88–01, did appoint REW Enterprises, Inc. as the Receiver for the Jackson FLB and the Jackson FLBA, and published the notice of appointment in the **Federal Register** on May 24, 1988, at 53 FR 18812, as required by FCA regulations;

Whereas, on May 25, 1988, the FCA Board, by Notational Vote NV–88–68 (25–May-88), approved the agreement entered into by the Receiver to enable the Federal Land Bank of Texas and the Federal Land Bank of Columbia to temporarily provide service to new borrowers in the territory formerly served by the Jackson FLB;

Whereas, on February 10, 1989, all territory assigned to the Jackson FLB was permanently reassigned to the Farm Credit Bank of Texas (successor to the Federal Land Bank of Texas) and on September 22, 1989, all such territory, for the purpose of originating and servicing loans for the Farm Credit Bank of Texas, was apportioned among the Federal Land Bank Association of North Alabama, the Federal Land Bank Association of South Alabama, the Federal Land Bank Association of North Louisiana, the Federal Land Bank Association of South Louisiana, the Federal Land Bank Association of North Mississippi, and the Federal Land Bank Association of South Mississippi;

Whereas, on May 4, 1993, the FCA approved the accounts of the Liquidating Institutions for the period May 20, 1988, through May 4, 1993, and REW Enterprises, Inc. was then discharged and released from all responsibility or liability to the FCA arising out of, related to, or in any manner connected with the administration and liquidation of the Liquidating Institutions during the period May 20, 1988, through May 4, 1993;

Whereas, on May 4, 1993, the FCA Board, by FCA Board Action BM–04–MAY–93–04, did appoint William E. Harvey & Associates, Inc. as Receiver (Receiver) for the Liquidating Institutions and published the notice of appointment in the **Federal Register** on May 18, 1993, at 58 FR 28962, as required by FCA regulations;

Whereas, all assets of and claims against the Liquidating Institutions have been disposed of by the Receiver in accordance with the provisions of FCA regulations and the written agreement dated May 4, 1993, between the Receiver and the FCA (Receivership Agreement);

Whereas, in accordance with the provisions of FCA regulations and the Receivership Agreement, all claims filed by creditors and holders of equities have been paid or provided for, including, without limitation, certain administrative expenses that the Receiver has paid;

Whereas, the final audit of the Liquidating Institutions was completed by Arthur Andersen **llp**, an independent auditor, as of November 30, 1994;

Whereas, on January 12, 1995, the FCA issued to the Receiver a final Report of Examination of the Jackson FLB and the Jackson FLBA as of December 31, 1994;

Whereas, on January 30, 1995, the Receiver distributed to the Farm Credit System Financial Assistance Corporation all remaining assets, which consisted of the amount in excess of the amount necessary to wind up the receivership, for application against or repayment of any FAC bonds issued after the Liquidating Institutions were placed in receivership in connection with the purchase of preferred stock issued by the Liquidating Institutions. As published in the **Federal Register** notice on November 21, 1990, at 55 FR 48691, any remaining funds of the Liquidating Institutions were to be refunded to the FAC in connection with the simultaneous retirement of an equal amount of preferred stock. The preferred stock was issued by the Liquidating Institutions for the purpose of funding maturing debt obligations, retiring eligible borrower stock, and operating the Liquidating Institutions; and

Now, therefore, it is hereby ordered that:

1. All claims of creditors, stockholders, holders of participation certificates and other equities, and of any other persons and/or entities against the Liquidating Institutions, and, all claims against the Receiver to the extent they arise out of the actions of the Receiver in carrying out the liquidation for the period May 4, 1993, through the date of this FCA Board action, are hereby forever and completely discharged and released against the Liquidating Institutions and the Receiver, and the commencement of any action, the employment of any process, or any other act to collect, recover, or offset any such claims is hereby forever barred.

2. The Receiver's accounts of the Liquidating Institutions for the period from May 4, 1993, through the effective date of this FCA Board action are hereby approved.

3. Except as provided in the Receivership Agreement, the Receiver is hereby finally and completely discharged and released from any responsibility or liability to the FCA or any other persons or entities arising out of related to, or in any manner connected with the administration and liquidation of the Liquidating Institutions during the period May 4, 1993, through the effective date of this FCA Board action. The FCA Board Action BM–04–MAY–93–04 is hereby superseded and terminated by this FCA Board action.

4. The charters of the Federal Land Bank of Jackson and the Federal Land Bank Association of Jackson are hereby cancelled.

5. The foregoing FCA Board action shall be effective at 5:00 p.m. Eastern Standard Time on January 30, 1995.

Signed by Marsha Martin, Chairman, Farm Credit Administration Board, on January 26, 1995.

Dated: February 1, 1995.

Floyd Fithian,

Acting Secretary, Farm Credit Administration Board.

[FR Doc. 95–2805 Filed 2–3–95; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

General Counsel's Opinion No. 7; Treatment of Assessments Paid by ''Oakar'' Banks and ''Sasser'' Banks on SAIF-Insured Deposits

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of FDIC General Counsel's Opinion No. 7.

SUMMARY: The FDIC Legal Division has received inquiries concerning the opinion it expressed in a letter sent to the United States General Accounting Office on April 23, 1992. In the 1992 letter, the Legal Division concluded that assessments paid on deposits acquired from members of the Savings Association Insurance Fund (SAIF) by banks through a transaction under section 5(d)(3) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1815(d)(3)) should remain in the SAIF and are not required to be allocated among the Financing Corporation, the Resolution Funding Corporation, or the FSLIC Resolution Fund. This General Counsel Opinion confirms the opinion expressed by the Legal Division in the 1992 letter and describes in greater detail the reasoning underlying that opinion. In addition, this General Counsel Opinion sets forth the Legal Division's position that assessments paid to the SAIF by any former savings association that (i) has converted from a savings association charter to a bank charter, and (ii) remains a SAIF member pursuant to section 5(d)(2)(G) of the FDI Act, are likewise not available to the Financing Corporation.

FOR FURTHER INFORMATION CONTACT: Valerie Jean Best, Counsel, Legal Division (202/898–3812), Federal Deposit Insurance Corporation, Washington, D.C. 20429.

Text

Opinion

The FDIC Legal Division has received inquiries concerning the opinion it expressed in a letter sent to the United States General Accounting Office (GAO) on April 23, 1992. This General Counsel Opinion confirms the opinion expressed by the Legal Division in the 1992 letter and sets out in greater detail the reasoning underlying that opinion. In addition, this General Counsel Opinion sets forth the Legal Division's position that assessments paid to the Savings Association Insurance Fund (SAIF) by any former savings association that has converted from a savings association charter to a bank charter but remains a SAIF member pursuant to section 5(d)(2)(G) of the Federal Deposit Insurance Act (FDI) Act, are not available to the Financing Corporation (FICO).

In the 1992 letter, the Legal Division advised the GAO that assessments paid on deposits acquired by banks from SAIF members under section 5(d)(3) of the FDI Act (12 U.S.C. 1815(d)(3)), the so-called ''Oakar'' provision, should remain in the SAIF, retroactive to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), and were not required to be allocated among the FICO, the Resolution Funding Corporation (REFCORP), or the FSLIC Resolution Fund (FRF). The GAO described this conclusion as ''reasonable'' in a letter dated May 11, 1992, from Charles A. Bowsher, Comptroller General of the United States, to the FDIC Board of Directors. Comptroller General Bowsher wrote: ''Based on our review of the applicable statutory provisions and information FDIC provided, we believe its conclusion and treatment of Oakar assessments are reasonable.'' The relevant financial statements were restated and prepared in reliance on the Legal Division's opinion, and the GAO subsequently cited the Legal Division's conclusion in its audits of the 1990, 1991, and 1992 financial statements of SAIF and FRF.

The principal reason stated in the 1992 letter for this conclusion was that Oakar banks (i.e., banks that had acquired deposits from SAIF members pursuant to section 5(d)(3) of the FDI Act) are members of the Bank Insurance Fund (BIF), not SAIF; thus, assessments paid by such BIF members are not subject to FICO, REFCORP or FRF draws because the applicable statutory provisions (12 U.S.C. 1441(f)(2), 1441b(e)(7), and 1821a(b)(4)) require contributions only from SAIF members. An additional basis for the Legal Division's conclusion, although not expressly stated, was that FICO's assessment authority extends only to savings associations which are SAIF members and therefore does not extend to Oakar banks since Oakar banks are not savings associations.

Conclusion

The express statutory language of FICO's enabling legislation grants assessment authority to FICO only over insured depository institutions which are both (1) savings associations and (2) SAIF members. Even if Oakar banks could be regarded as members of both BIF and SAIF rather than just BIF (which we do not think is the correct view), they are not savings associations. Where, as here, the relevant statutory language (which, in this case, limits FICO's assessment authority to savings associations that are SAIF members) is clear and unambiguous, well-established principles of statutory construction dictate that the plain meaning of the statute must be given effect. The Legal Division concludes that the opinion expressed in the 1992 letter—that SAIF assessments paid by Oakar banks should remain in the SAIF and are not subject to FICO, REFCORP, or FRF draws—remains correct.

Further, the Legal Division concludes that SAIF assessments paid by any former savings association that (i) has converted from a savings association charter to a bank charter, and (ii) remains a SAIF member pursuant to section 5(d)(2)(G) of the FDI Act (a so-called ''Sasser'' bank), are likewise not subject to draws by FICO. The FDI Act expressly provides that any such institution is a bank. Since FICO's assessment authority extends only to savings associations which are SAIF members, and since Sasser banks are not savings associations, SAIF assessments paid by Sasser banks are not subject to draws by FICO.

Discussion

I. FICO's Assessment Authority

In relevant part, section 21(f)(2) of the Federal Home Loan Bank Act (FHLB Act) provides,

> (f) Sources of funds for interest payments; Financing Corporation assessment authority. The Financing Corporation shall obtain funds for anticipated interest payments, issuance costs, and custodial fees on obligations issued hereunder from the following sources:
>
> * * * * *
>
> (2) New assessment authority. To the extent the amounts available pursuant to paragraph (1) are insufficient to cover the amount of interest payments, issuance costs, and custodial fees, the Financing

Corporation, with the approval of the Board of Directors of the [FDIC], shall assess against each Savings Association Insurance Fund member an assessment (in the same manner as assessments are assessed against such members by the [FDIC] under section 7 of the FDI Act * * *.

12 U.S.C. 1441(f)(2) (emphasis added).

Section 21(k)(1) of the FHLB Act defines the term ''Savings Association Insurance Fund member'' as ''a savings association which is a Savings Association Insurance Fund member as defined by section 7(l) of the FDI Act.'' 12 U.S.C. 1441(k)(1).

Thus, with the approval of the FDIC Board of Directors, FICO has the statutory authority to levy assessments against each ''savings association which is a (SAIF) member.'' Read together, these statutory provisions limit FICO's assessment authority to an institution which is both a savings association and a SAIF member as defined in section 7(l) of the FDI Act.

II. An Oakar Bank Is Neither a Savings Association Nor a SAIF Member and Thus Is Not Subject to FICO Draws

A. An Oakar Bank Is Not a ''Savings Association''

The term ''savings association'' is defined in the FHLB Act by reference to section 3 of the FDI Act. 12 U.S.C. 1422(9). In turn, section 3(b) of the FDI Act provides:

(b) *Definition of Savings Associations and Related Terms.*

(1) Savings Association.—The term ''savings association'' means—

(A) any Federal savings association;

(B) any State savings association; and

(C) any corporation (other than a bank) that the [FDIC] Board of Directors and the Director of the Office of Thrift Supervision jointly determine to be operating in substantially the same manner as a savings association.

(2) Federal Savings Association.—The term ''Federal savings association'' means any Federal savings association or Federal savings bank which is chartered under section 5 of the Home Owners' Loan Act.

(3) State Savings Association.—The term ''State savings association'' means—

(A) any building and loan association, savings and loan association, or homestead association; or

(B) any cooperative bank (other than a cooperative bank which is a State bank as defined in subsection (a)(2)),

which is organized and operating according to the laws of the State * * * in which it is chartered or organized.

12 U.S.C. 1813(b).

Pursuant to section 3 of the FDI Act, the term ''bank'' means any national bank, State bank, District bank, and any Federal branch and insured branch.

Although the FDI Act does not further define the term ''bank,'' the FDIC, throughout its history, has required that a State-chartered financial institution be chartered by its State of incorporation as a bank if that institution is to be regarded as a bank by the FDIC. In determining a financial institution's status as a bank rather than a savings association, the FDIC will generally look to the characterization of the institution by the laws under which the institution is created. An Oakar bank is an institution that pre-existed the merger or assumption in which it gained Oakar-bank status and, prior to that merger or assumption, it was a ''bank'' in every way.

Whether or not the limitations contained in the moratorium provision (12 U.S.C. 1815(d)(2)) or the Oakar provision apply in any given situation depends solely on the fund membership of the participating institutions; neither provision specifically refers to the charter of a covered institution. Thus, the statutory language of the moratorium and the Oakar provisions does not provide any basis for concluding that a bank participating in an Oakar transaction thereby forfeits its bank charter and somehow becomes a savings association. In this regard, we note that the sponsor of the Oakar Amendment emphasized that the Amendment had been drafted with great care and further emphasized that the Amendment would benefit the SAIF. Rep. Oakar commented:

I am exceedingly proud of this language as it is and always was intended to utilize private capital from the bank holding companies to bolster the SAIF fund * * * [A]s we briefed staffs of the Senate Banking and House Banking Committees and they in turn, briefed their members, support for the amendment grew. This was due to the benefit to taxpayer[s] and to the SAIF fund. But also to [the] care with which the amendment had been drafted.

135 Cong. Rec. H4970 (daily ed. Aug. 3, 1989) (statement of Rep. Oakar).

The Oakar provision was added to the pending legislation, for the first time, at the Committee of Conference level.

Both the Oakar provision and the provision governing FICO's assessment authority were before the Committee of Conference, and the Committee had available to it alternative language that would have extended FICO's authority to the assessments paid to SAIF by BIF-member Oakar banks. The Committee chose to adopt language that limits FICO's assessment authority to savings associations that are SAIF members.[1]

Since FICO was granted the authority to assess savings associations but not banks, and a bank that acquires SAIF deposits pursuant to section 5(d)(3) of the FDI Act does not thereby relinquish or modify its bank charter to become a ''savings association,'' we conclude that SAIF assessments paid by Oakar banks should remain in the SAIF and are not subject to draws by FICO.

B. An Oakar Bank Is Not a SAIF Member

1. *Definition of the Term ''SAIF Member.''* As noted above, FICO has the statutory authority to levy assessments against each savings association which is a ''Savings Association Insurance Fund member as defined by section 7(*l*).'' The term ''Savings Association Insurance Fund member'' means ''any depository institution the deposits of which are insured by the Savings Association Insurance Fund.'' 12 U.S.C. 1817(*l*)(5). The term ''Bank Insurance Fund member'' means ''any depository institution the deposits of which are insured by the Bank Insurance Fund.'' 12 U.S.C. 1817(*l*)(4).

With regard to fund membership, section 7(*l*) of the FDI Act provides as follows:

Designation of fund membership for newly insured depository institutions; definitions. For purposes of this section:

(1) *Bank insurance fund.* Any institution which—

(A) becomes an insured depository institution; and

(B) does not become a Savings Association Insurance Fund member pursuant to paragraph (2),

shall be a Bank Insurance Fund member.

(2) *Savings association insurance fund.* Any savings association, other than any

[1] Earlier drafts of the legislation governing FICO's assessment authority did not restrict FICO's assessment authority to a ''savings association'' which is a SAIF member. Specifically, the House and Senate versions sent to the Committee of Conference provided that FICO had assessment authority over each ''Savings Association Insurance Fund member.'' H.R. 1278, 101st Cong., 1st Sess. § 503 at p. 400 (passed by the House June 1, 1989); S. 774, 101st Cong., 1st Sess., § 503, 135 Cong. Rec. S4350 (April 19, 1989). While these earlier versions defined the term ''savings association,'' neither version contained a definition for ''SAIF member.'' If either provision had been enacted as drafted at that time, FICO's assessment authority would have extended to all SAIF members, regardless of charter. In fact, the definition of the term ''SAIF member'' elsewhere in the Senate bill included ''any other financial institution that is required to pay assessments into the [SAIF].'' Id. 135 Cong. Rec. at S4311. The House version defined SAIF member to mean ''any financial institution the deposits of which are insured by the [SAIF].'' H.R. 1278, 101st Cong., 1st Sess. § 207 at p. 71 (passed by the House June 1, 1989). Had the Senate definition of SAIF member been adopted, FICO would have had the authority to draw on assessments paid to SAIF by BIF-member Oakar banks. The Committee of Conference did not adhere to either version, however. Instead, the Committee chose to add the current SAIF-member definition to the FICO provision, thereby limiting FICO's authority to savings associations which are SAIF members. H.R. Conf. Rep. No. 1278, 101st Cong., 1st Sess. § 512 at p. 240 and § 206 at p. 19–21 (1989).

Federal savings bank chartered pursuant to section 5(o) of the Home Owners' Loan Act, which becomes an insured depository institution shall be a Savings Association Insurance Fund member.

(3) *Transition provision.*

(A) *Bank insurance fund.* Any depository institution the deposits of which were insured by the [FDIC] on the day before [August 9, 1989], including—

(i) any Federal savings bank chartered pursuant to section 5(o) of the Home Owners' Loan Act; and

(ii) any cooperative bank,

shall be a Bank Insurance Fund member as of [August 9, 1989].

(B) *Savings association insurance fund.* Any savings association which is an insured depository institution by operation of section 4(a)(2) shall be a Savings Association Insurance Fund member as of [August 9, 1989].

12 U.S.C. 1817(*l*)(1)–(3).

The FDI Act does not explicitly state that a depository institution cannot be a member of both SAIF and BIF at the same time, but the FDI Act implies that this is so. By designating any newly insured depository institution that does not become a SAIF member to be a BIF member, the FDI Act indicates that membership in one fund necessarily excludes membership in the other fund. The designation of depository institutions insured prior to the enactment of FIRREA as either SAIF members or BIF members, lends further support to the view that a depository institution cannot belong to both funds at the same time. Since the SAIF and the BIF were first established by FIRREA the FDIC has treated an insured depository institution as either a SAIF member or a BIF member but not both.

2. A Bank Retains its Status as a BIF Member When it Acquires Deposits from A Savings Association Pursuant to Oakar. Nothing in 5(d)(3) of the FDI Act indicates that an institution forfeits its fund-designation by virtue of participating in an Oakar transaction. Rather, section 5(d)(3) provides that in the case of any ''acquiring, assuming, or resulting depository institution which is a Bank Insurance Fund member,'' that portion of the deposits of such member attributable to the former SAIF member ''shall be treated as'' deposits which are SAIF-insured for purposes of calculating the assessment to be paid to SAIF, and for purposes of allocating costs in the event of default.[2] The fact that section 5(d)(3) refers to the acquiring, assuming, or resulting depository institution as a BIF member, and the use of the phrase ''treated as'' SAIF deposits—as opposed to ''are'' SAIF deposits—indicates that a BIF member acquiring deposits from a SAIF member pursuant to section 5(d)(3) retains its status as a BIF member.

Since FICO's assessment authority extends only to ''a savings association which is a [SAIF] member,'' and (1) a depository institution cannot be a member of BIF and SAIF at the same time, and (2) a BIF member that acquires deposits from a SAIF member pursuant to section 5(d)(3) of the FDI Act retains its status as a BIF member, it is our opinion that SAIF assessments paid by BIF-member Oakar banks should remain in the SAIF and are not subject to draws by FICO. Moreover, neither REFCORP nor FRF are permitted to assess BIF-member Oakar banks since their assessment authority extends only to ''Savings Association Insurance Fund members.'' [3]

C. BIF-Member Oakar Banks Are Not Subject to FICO Draws

Nothing in the legislative history of section 21 of the FHLB Act indicates that Congress intended a result other than that required by the plain language of the statute. There is no specific evidence to suggest that Congress intended the phrase ''a savings association which is a [SAIF] member'', as used in that Act, to have any meaning other than the normal meaning of the words. The best, if not the only, manifestation of congressional intent in this instance is the language of the statute; we cannot base our interpretation on a supposed intent that is not spelled out in the statutory text or the legislative history.

The conclusion that an Oakar bank is not subject to FICO draws because it is neither a savings association nor a SAIF member finds ample support in the relevant statutory text. A contrary interpretation would disregard the explicit statutory language which grants assessment powers to FICO only over savings associations that are SAIF members.[4] Moreover, the conclusion that an Oakar bank is not subject to REFCORP or FRF draws because an Oakar bank is not a SAIF member finds ample support in the relevant statutory text.

It is consistent with the purposes of the legislation to retain these SAIF assessments in SAIF. Under section 5(d)(3), the SAIF, rather than the Resolution Trust Corporation (RTC), is required to bear the cost of any loss attributable to the SAIF-insured deposits held by an Oakar bank. Thus, SAIF was and is responsible for losses attributable to resolving the SAIF-insured part of BIF-member Oakar banks. In the absence of the 1992 letter, SAIF would have had no funding to cover insurance losses for which it was and is responsible by statute. The FDIC and Federal Government agencies have relied on the views expressed in the 1992 letter to allocate the cost of resolving failed institutions between the SAIF and the RTC. The FDIC has relied on the letter to allocate assessments between the SAIF and the FRF.

III. A Sasser Bank is Not a ''Savings Association'' and Thus is not Subject to FICO Draws

Likewise, it is our opinion that SAIF assessments paid by any former savings association that (i) has converted from a savings association charter to a bank charter, and (ii) remains a SAIF member pursuant to section 5(d)(2)(G) of the FDI Act, are not subject to FICO draws. As explained above with regard to Oakar banks, FICO's assessment authority extends only to savings associations which are SAIF members. Sasser institutions are not savings associations. Rather, the FDI Act expressly provides that Sasser institutions are banks. More specifically, section 3(a)(1) of the FDI Act provides:

(a) Definition of Bank and Related Terms.

(1) Bank.—The term ''bank''—

(A) means any national bank, State bank, and District bank, and any Federal branch and insured branch;

(B) includes any former savings association that—

(i) has converted from a savings association charter; and

(ii) is a Savings Association Insurance Fund member.

12 U.S.C. 1813(a)(1).

Although a Sasser bank is a SAIF member, it is classified as a ''bank'' by the FDI Act. As a result, such an institution is not subject to draws by FICO. In contrast to BIF-member Oakar banks, however, Sasser banks are

[2] The deposits that are attributable to the former SAIF member are calculated under a formula prescribed at FDI Act section 5(d)(3)(C). The dollar amount resulting from the statutorily prescribed formula is the ''adjusted attributable deposit amount'' or ''AADA''.

[3] With regard to REFCORP's assessment authority, see 12 U.S.C. 1441b(e)(7), 1441b(k)(8), 1817(*l*). With regard to FRF's assessment authority, see 12 U.S.C. 1821a(b)(4), 1817(*l*).

[4] At the urging of the Federal Housing Finance Board (the ''FHF-Board''), the Office of Thrift Supervision has decided not to require Oakar banks and ''Sasser'' banks (SAIF-member savings associations that convert to bank charters but remain SAIF members) to maintain Federal Home Loan Bank membership. 58 FR 14510, 14512 (March 18, 1993). The FHF-Board concluded that it had no authority to prohibit a savings association that converts to a commercial bank or state savings bank charter from withdrawing from membership. The FHLB Act prohibits Federal savings associations from withdrawing from Federal Home Loan Bank membership, but does not apply to institutions with other types of charters.

subject to draws by REFCORP and FRF. This is because REFCORP and FRF have statutory authority to assess SAIF members regardless of the SAIF-member's charter.

Based on the foregoing, the Legal Division concludes that the opinion expressed in the 1992 letter remains correct, and further concludes that assessments paid to SAIF by any former savings association that (i) has converted from a savings association charter, and (ii) is a SAIF member, are likewise not subject to FICO draws.

Dated: January 31, 1995.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 95–2795 Filed 2–3–95; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE BOARD

[No. 95–N–02]

Monthly Survey of Rates and Terms On Conventional, 1-Family, Nonfarm Mortgage Loans

AGENCY: Federal Housing Finance Board.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Board (Housing Finance Board) hereby gives notice that it has submitted to the Office of Management and Budget (OMB) a request for review and approval of an extension of a currently approved information collection titled ''Monthly Survey of Rates and Terms on Conventional, 1-Family, Nonfarm Mortgage Loans,'' in accordance with the requirements of the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before April 7, 1995.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Milo Sunderhof, Desk Officer, Federal Housing Finance Board, 726 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the information collection and supporting documentation should be addressed to Elaine L. Baker, (202) 408–2837, Executive Secretariat, Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Joseph A. McKenzie, Associate Director, Housing Finance Directorate, (202) 408–2845; Eric M. Raudenbush, Attorney-Advisor, Office of General Counsel, (202) 408–2932, Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: The information collection described below has been submitted to OMB for review in order to obtain a renewal of OMB approval prior to expiration of the currently assigned OMB control number (3069–0001) on March 31, 1995.

Title of Information Collection: Monthly Survey of Rates and Terms on Conventional, 1-Family, Nonfarm Mortgage Loans

Form Number: FHFB 10–91

OMB Number: 3069–0001

Expiration Date of Clearance: March 31, 1995

Frequency of Response: Monthly

Respondents: A sample of savings associations, mortgage companies, commercial banks, and savings banks.

Need For and Use of Information Collection: The Housing Finance Board uses the results of the information collection to maintain a monthly survey of mortgage interest rates. The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) use the average single-family house price from the survey to determine the maximum size of single-family loans that they can purchase or guarantee, pursuant to 12 U.S.C. 1454(a)(2) and 1717(b)(2).

Furthermore, Section 402(e)(3) of the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101–73, 103 State. 183 (1989), requires the Chairman of the Housing Finance Board to take whatever action as may be necessary to ensure that adjustable-rate mortgage (ARM) indexes formerly published by the Federal Home Loan Bank Board (FHLBB) or the Federal Savings and Loan Insurance Corporation (FSLIC) continue to be published. An ARM index—the National Average Contract Mortgage Rate for the Purchase of Previously Occupied Homes by Combined Lenders—is derived from the survey data.

More recently, the 1994 HUD appropriation act linked the ''high-cost area limits'' for Federal Housing Administration (FHA)-insured mortgages to the purchase-price limitations of Fannie Mae and Freddie Mac. *See* Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. 103–327, 108 Stat. 2298 (1994). In addition, the Internal Revenue Service (IRS) uses the data from this survey to determine the ''safe-harbor'' limits for mortgages purchased with the proceeds of mortgage revenue bond issues. *See* 26 CFR Section 6a.103A–2(f)(5).

The information is also used for general statistical purposes and program evaluation, and by economic policy makers to determine trends in the mortgage markets, including interest rates, down payments, terms to maturity, terms on ARMs, and initial fees and charges on mortgage loans. The data may be provided to Federal banking agencies for research purposes. Information from the survey is regularly published in the popular and trade press, in Housing Finance Board releases, and in several publications of other Federal agencies.

The survey provides the only consistent source of information on mortgage interest rates and terms and house prices for areas smaller than the entire country.

ESTIMATED ANNUAL REPORTING BURDEN

Annual No. respondents	x	Annual No. responses per respondent	=	Total annual responses	x	Avg. hrs. per response	=	Total annual hours
550		12		6,600		1.0		6,600

Dated: January 30, 1995.

Federal Housing Finance Board.

Rita I. Fair,

Managing Director.

[FR Doc. 95–2850 Filed 2–3–95; 8:45 am]

BILLING CODE 6725–01–M

FEDERAL RESERVE SYSTEM

First Chicago Corporation; Notice of Application to Engage de novo in Permissible Nonbanking Activities

The company listed in this notice has filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.'' Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 21, 1995.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. First Chicago Corporation, Chicago, Illinois; to engage *de novo* through its subsidiary First Chicago Capital Markets, Inc., Chicago, Illinois, in the purchase and sale, for its own account, of certain options and options on futures contracts with respect to certain bank-eligible securities and money market instruments, for purposes, other than hedging. This activity has been approved by Board order. *See The Dai-Ichi Kangyo Bank, Limited*, 80 Fed. Res. Bull. 148 (1994) and *Swiss Bank Corporation*, 77 Fed. Res. Bull. 759 (1991).

Board of Governors of the Federal Reserve System, January 31, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–2788 Filed 2–3–95; 8:45 am]

BILLING CODE 6210–01–F

Old National Bancorp; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 94–14508) published on page 30802 of the issue for Wednesday, June 15, 1994.

Under the Federal Reserve Bank of Sr. Louis heading, the entry for Old National Bancorp, is revised to read as follows:

1. Old National Bancorp, Evansville, Indiana; to engage *de novo* though its subsidiaries, The ONB Trust Company, N.A., Terre Haute, Indiana, The Old National Trust Company, -- Kentucky, Morganfield, Kentucky, and The ONB Trust Company, N.A. -- Illinois, Mt. Carmel, Illinois, in trust company activities pursuant to § 225.25(b)(3) of the Board's Regulation Y.

Comments on this application must be received by February 22, 1995.

Board of Governors of the Federal Reserve System, January 31, 1995.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 95–2789 Filed 2–3–95; 8:45 am]

BILLING CODE 6210–01–F

GENERAL ACCOUNTING OFFICE

Federal Accounting Standards Advisory Board

AGENCY: General Accounting Office.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. No. 92–463), as amended, notice is hereby given that the regular monthly meeting of the Federal Accounting Standards Advisory Board will be held on Wednesday, February 15 from 2:30 p.m. to 4:30 p.m. in room 7C13 of the General Accounting Office and continuing on Thursday, February 16 from 9:00 a.m. to 4:30 p.m. in room 4N30 (note different room) of the General Accounting Office, 441 G St., N.W., Washington, D.C.

The agenda for the meeting includes discussions of the Revenue Recognition draft Exposure Draft and the Managerial Cost Accounting Standards project.

We advise that other items may be added to the agenda; interested parties should contact the Staff Director for more specific information and to confirm the date of the meeting. Any interested person may attend the meeting as an observer. Board discussions and reviews are open to the public.

FOR FURTHER INFORMATION CONTACT: Ronald S. Young, Executive Staff Director, 750 First St., N.E., Room 1001, Washington, D.C. 20002, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463, Section 10(a)(2), 86 Stat. 770, 774 (1972) (current version at 5 U.S.C. app. section 10(a)(2) (1988); 41 CFR 101–6.1015 (1990).

Dated: January 31, 1995.

Ronald S. Young,

Executive Director.

[FR Doc. 95–2742 Filed 2–3–95; 8:45 am]

BILLING CODE 1610–01–M

GENERAL SERVICES ADMINISTRATION

Fresno Federal Building/United States Courthouse; Notice of Intent

AGENCY: United States General Services Administration.

ACTION: Notice of Intent to prepare an Environmental Impact Statement (EIS) for a new Federal Building/United States Courthouse.

SUMMARY: The action to be evaluated by this EIS is the construction of a new Federal Building/United States Courthouse Fresno, California. The facility will be located on an approximately 4.5 acre site and includes construction of 392 subterranean and surface parking spaces.

ALTERNATIVES: The EIS will evaluate three alternative sites. Two of the sites are located in the downtown area of the City while a third is located in north Fresno. In addition, as required by National Environmental Policy Act (NEPA), the EIS will also analyze the ''No Action'' alternative as a baseline for gauging the impacts of not building a new courthouse.

PUBLIC INVOLVEMENT: The public will be invited to participate in the scoping process, review of the Draft EIS, and a public meeting. The scoping meeting will be held in Jury Assembly Room 5454, in the B.F. Sisk Federal Building and U.S. Courthouse, 1130 ''O'' Street, Fresno, California, from 4:00 p.m. to 7:00 p.m. on February 9, 1995. Release of the Draft EIS for public comments and the time and location for the public meeting will also be announced in the local news media as these dates are determined.

POINTS OF CONTACT: Mr. Javad Soltani, Facilities Planner, United States General Services Administration, Region 9. (415) 744–5255.

Dated: January 26, 1995.

Kenn N. Kojima,

Regional Administrator (9A).

[FR Doc. 95–2740 Filed 2–3–95; 8:45 am]

BILLING CODE 6820–23–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 95F–0011]

Kuraray International Corp.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Kuraray International Corp. has filed a petition proposing that the food additive regulations be amended to provide for the safe use of styrene block copolymer with 2-methyl-1,3-butadiene and 1,3-butadiene, hydrogenated as a component of articles that contact food.

DATES: Written comments on the petitioner's environmental assessment by March 8, 1995.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Helen R. Thorsheim, Center for Food Safety and Applied Nutrition (HFS–216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3092.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 5B4448) has been filed by Kuraray International Corp., c/o 1001 G St. NW., suite 500 West, Washington, DC 20001. The petition proposes to amend the food additive regulations in § 177.1810 *Styrene block polymers* (21 CFR 177.1810) to provide for the safe use of styrene block copolymer with 2-methyl-1,3-butadiene and 1,3-butadiene, hydrogenated (CAS Reg. No. 132778–07–5) as a component of articles that contact food.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations promulgated under the National Environmental Policy Act (40 CFR 1501.4(b)), the agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Dockets Management Branch (address above) for public review and comment. Interested persons may, on or before March 8, 1995, submit to the Dockets Management Branch (address above) written comments. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register**. If, based on its review, the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: January 26, 1995.

Alan M. Rulis,

Acting Director, Office of Premarket Approval, Center for Food Safety Applied Nutrition.

[FR Doc. 95–2790 Filed 2–3–95; 8:45 am]

BILLING CODE 4160–01–F

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings:

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel—Anesthesiology.

Date: February 8, 1995 (Telephone Conference).

Time: 2 p.m.–5:30 p.m.

Place: 45 Center Drive, Room 1AS–13J, Bethesda, MD 20892–6200.

Contact Person: Dr. Irene Glowinski, Scientific Review Administrator, 45 Center Drive, Room 1AS–13J, MSC 6200, Bethesda, MD 20892–6200.

Purpose: To review and evaluate grant applications.

Name of Committee: Cellular and Molecular Basis of Disease Review Committee.

Date: February 28, 1995.

Time: 8 a.m.–5:30 p.m.

Place: Embassy Suites, Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Dr. Carole Latker, Scientific Review Administrator, 45 Center Drive, Room 1AS–13K, MSC 6200, Bethesda, MD 20892–6200.

Purpose: To review and evaluate grant applications.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel—Anesthesiology.

Date: March 6, 1995 (Telephone Conference).

Time: 2 p.m.–5:30 p.m.

Place: 45 Center Drive, Room 1AS–13J, Bethesda, MD 20892–6200.

Contact Person: Dr. Irene Glowinski, Scientific Review Administrator, 45 Center Drive, Room 1AS–13J, MSC 6200, Bethesda, MD 20892–6200.

Purpose: To review and evaluate grant applications.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. The discussions of these applications could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is being published less than fifteen days prior to the first meeting due to the urgent need to meet timing limitations imposed by the grant review cycle.

(Catalog of Federal Domestic Assistance Program Nos. 93.821, Biophysics and Physiological Sciences; 93.859, Pharmacological Sciences; 93.862, Genetics Research; 93.863, Cellular and Molecular Basis of Disease Research; 93.880, Minority Access Research Careers [MARC]; and 93.375, Minority Biomedical Research Support [MBRS].

Dated: January 31, 1995.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 95–2873 Filed 2–3–95; 8:45 am]

BILLING CODE 4140–01–M

Public Health Service

Office of the Assistant Secretary for Health, Title XVII of the Public Health Service Act; Delegation of Authority

Notice is hereby given that in furtherance of the delegation of authority to the Assistant Secretary for Health on September 28, 1979, by the Secretary of Health and Human Services, the Assistant Secretary for Health has delegated to the Executive Director, President's Council on Physical Fitness and Sports, all of the authorities under Title XVII of the Public Health Service Act, as amended, pertaining to the mission of the President's Council. The delegation excludes the authorities to issue regulations and to submit reports to the President. The delegation includes, but is not limited to, the authorities under section 1702(a) (1) and (3), section 1703(a) (1) and (2), and section 1704 (1) and (2).

In addition, I hereby affirm and ratify any actions taken by the Executive Director which in effect involve the exercise of the authorities delegated herein prior to the effective date of the delegation.

Redelegation

This authority may not be redelegated.

Prior Delegations

All previous delegations and redelegations under Title XVII of the Public Health Service Act shall continue in effect, provided they are consistent with this delegation.

Effective Date

This delegation became effective on January 11, 1995.

Dated: January 11, 1995.

Philip R. Lee,

Assistant Secretary for Health.

[FR Doc. 95–2773 Filed 2–3–95; 8:45 am]

BILLING CODE 4160–17–M

Office of the Assistant Secretary for Aging

Federal Council on the Aging; Notice of Meeting

Agency Holding the Meeting: Federal Council on the Aging (FCoA).

Time and Date: Meeting begins at 9 a.m. and ends at 5 p.m. on Wednesday, February 22, 1995, and begins again at 8:45 a.m. and ends at 4 p.m. on Thursday, February 23, 1995.

Place: On Wednesday, February 22 and Thursday, February 23 the meeting will be held in the Stonehenge Conference Room 615–F (sixth floor) of the Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

Status: The meeting is open to the public. (Due to building security, the names of attendees should be called into the FCoA office prior to the meeting dates).

Contact Person: Brian Lutz, room 4657 Wilbur Cohen Federal Building, 330 Independence Avenue SW., Washington, DC 20201, PH: (202) 619–2451.

The Federal Council on the Aging was established by the 1973 Amendments to the Older Americans Act of 1965 (Public Law 93–29; 42 U.S.C. 3015) for the purpose of advising the President on matters related to the special needs of older Americans.

Notice is hereby given pursuant to the Federal Advisory Committee Act (Pub. L. 92–453, 5 U.S.C. app. 1, section 10, 1976) that the Council will hold a quarterly meeting on February 22 from 9 a.m. to 5 p.m. in the Stonehenge Conference Room 615–F (sixth floor) of the Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC, and February 23 from 8:45 a.m. to 4 p.m. in the Stonehenge Conference Room 615–F (sixth floor) of the Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

Agenda: The Council's activities will focus on the issue priorities for fiscal year 1995 which were adopted at the last quarterly meeting, including the development of informational material and policy recommendations pertaining to: (1) The Older Americans Act, (2) mental health and aging; and (3) pre- and post-activities related to the 1995 White House Conference on Aging.

On February 22, from 9 a.m. to 10 a.m., deliberations will be held on the Council's regular business, including an update of activities by the Chairman, Council members,and the executive director. These deliberations will include the development of specific projects sponsored by the Council related to mental health and aging: (1) Formal approval of the FCoA's Annual Report to the President of findings and recommendations during 1994; (2) a book being done in conjunction with the National Institutes of Mental Health on the special mental health needs and characteristics of older persons; (3) an issue brief of policy recommendations regarding mental health and aging; and (4) preparations for the Council's participation in a White House Conference on Aging Mini-Conference on Mental Health to be held on February 24–26, 1995.

On February 22, from 10 a.m. to 11 a.m. the Council will receive an update on issues related to the Older Americans Act from the Assistant Secretary for Aging, Dr. Fernando Torres-Gil. From 11 a.m. to 12:30 p.m., the Council will discuss issues and recommendations related to the reauthorization of the Older Americans Act.

On February 22, from 1:30 p.m. to 5 p.m., the Council will discuss issues related to mental health and aging, health care, and long-term care.

On February 23, the meeting will convene at 8:45 a.m. to consider business from the previous meeting. From 9 a.m. to 9:15 a.m., the Secretary of Health and Human Services, the Honorable Donna Shalala, has been invited to provide the Council with an overview of the role and importance of the 1995 White House Conference on Aging. From 9:30–10:30 a representative from the WHCoA staff will provide an update on the priority issues and agenda for the Conference. From 10:30 a.m. to 12:30 p.m., the Council will discuss issues in preparation for the Conference. These deliberations will include an update of the Council members' participation in many pre-conference and mini-conference activities throughout the country, the planned leadership role of the Council at the Conference, and the discussion of a strategy for working to follow through on priority recommendations arising from the Conference.

On February 23, from 1:30 to 4 p.m., the Council will discuss providing informational material and policy recommendations to the President and the Congress on priority issues of the Council.

Dated: January 30, 1995.

Brian T. Lutz,

Executive Director.

[FR Doc. 95–2747 Filed 2–3–95; 8:45 am]

BILLING CODE 4130–01–M

Centers for Disease Control and Prevention

National Committee on Vital and Health Statistics (NCVHS) Subcommittee on Health Statistics for Minority and Other Special Populations: Meeting

Pursuant to Pub. L. 92–463, the National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC), announces the following subcommittee meeting.

Name: NCVHS Subcommittee on Health Statistics for Minority and Other Special Populations.

Time and Date: 9 a.m.–12 noon, March 8, 1995.

Place: Room 337A–339A, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, D.C. 20201.

Status: Open.

Purpose: The subcommittee will receive reports from academic and other researchers who have been investigating health issues among migrant and immigrant populations, including undocumented workers. This meeting is part of the subcommittee's effort to consider possible effects of legislation requiring disclosure of immigration status on data quality and on access, costs, and outcomes of care.

Further More Information Contact: Substantive program information as well as summaries of the meeting and a roster of committee members may be obtained from Gail F. Fisher, Ph.D., Executive Secretary, NCVHS, NCHS, CDC, Room 1100, Presidential Building, 6525 Belcrest Road, Hyattsville, Maryland 20782, telephone 301/436–7050.

Dated: January 31, 1995.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–2779 Filed 2–3–95; 8:45 am]

BILLING CODE 4163–18–M

Hanford Thyroid Morbidity Study Advisory Committee; Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Hanford Thyroid Morbidity Study Advisory Committee.

Times and Date: 9 a.m.–5 p.m., February 22, 1995; 7 p.m.–9 p.m., February 22, 1995.

Place: Radisson Hotel Seattle Airport, 17001 Pacific Highway South, Seattle, Washington 98188.

Status: Open to the public, limited only by the space available.

Purpose. This committee is charged with providing advice and guidance to the Director, CDC, regarding the scientific merit and direction of the Hanford Thyroid Morbidity Study. The committee will review development of the study protocol and recommend changes of scientific merit to CDC, advise on the conduct of the pilot study using the approved protocol, and assist in determining the feasibility of a full-scale epidemiologic study. If the full-scale epidemiologic study is carried out, the committee will advise CDC on the design and conduct of the study and analysis of the results.

Matters to be Discussed. The Hanford Thyroid Morbidity Study Advisory Committee will meet to: (1) Discuss updates of the status of various components of the Hanford Thyroid Morbidity Study and provide recommendations to CDC as to whether a full blown study is feasible; and (2) conduct a public meeting for open discussion and inform the public on the progress of the pilot study being conducted by the Fred Hutchinson Cancer Research Center. Specifically, the discussions will focus on public information activities, Native American components, and status reports on the conduct of the pilot study. On February 22 at 7 p.m., the meeting will continue in order to allow more time for public input and comment not addressed during the morning and afternoon sessions.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: Nadine Dickerson, Program Analyst, Radiation Studies Branch, Division of Environmental Hazards and Health Effects, National Center for Environmental Health, CDC, 4770 Buford Highway, NE, (F–35), Atlanta, Georgia 30341–3724, telephone 404/488–7040.

Dated: January 31, 1995.

William H. Gimson,

Acting Association Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–2781 Filed 2–3–95; 8:45 am]

BILLING CODE 4163–18–M

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Cooperative Agreements for Competitive Supplements to the Human Immunodeficiency Virus (HIV) Prevention Program: Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: Disease, Disability, and Injury Prevention and Control Sep: Cooperative Agreements for Competitive Supplements to the HIV Prevention Program.

Time and Dates: 8:30 a.m.–4:30 p.m., March 6–9, 1995.

Place: Holiday Inn at Lenox/Buckhead, Westchester Room, 3377 Peachtree Road, NE, Atlanta, Georgia 30326.

Status: Closed.

Matters to be Discussed. The meeting will include the review, discussion, and evaluation of applications received in response to supplemental guidance for HIV prevention cooperative agreements. The applications being reviewed include information of a confidential nature, including personal information concerning individuals associated with the applications.

The meeting will be closed to the public in accordance with provisions set forth in section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Acting Associate Director for Policy Coordination, CDC, pursuant to Pub. L. 92–463.

For Further Information Contact: John R. Lehnherr, Chief, Resource Analysis Office (E07), National Center for Prevention Services, CDC, Corporate Square, Corporate Square Boulevard, Atlanta, Georgia 30329, telephone 404/639–8023.

Dated: January 31, 1995.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–2782 Filed 2–3–95; 8:45 am]

BILLING CODE 4163–18–M

Childhood Lead Poisoning Prevention Program Guarantee Workshop; Notice

The National Center for Environmental Health (NCEH) of the Centers for Disease Control and Prevention (CDC) announces the following workshop.

Name: CDC Funded Childhood Lead Poisoning Prevention Program Guarantee Workshop.

Times and Dates: 8:30 a.m.–5 p.m., February 28, 1995; 8:30 a.m.–4 p.m., March 1, 1995; 8:30 a.m.–5 p.m., March 2, 1995; 8:30 a.m.–12 noon, March 3, 1995.

Place: Holiday Inn at Lenox, 3377 Peachtree Road, NE, Atlanta, Georgia 30326.

Status: Open to the public, limited only by the space available.

Purpose: The primary purpose of this workshop is to provide assistance to CDC's Childhood Lead Poisoning Prevention grant recipients in addressing program development, assessment and evaluation issues and concerns.

Matters to be Discussed: Topics to be discussed include information management, program evaluation, and training issues.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: David Guthrie or Claudette Grant, Childhood Lead Poisoning Prevention Branch, Division of Environmental Hazards and Health Effects (F42), NCEH, CDC, 4770 Buford Highway, NE, Chamblee, Georgia 30341–3724, telephone 404/488–7330.

Written comments are welcome and should be received by the contact person no later than February 14, 1995. Persons wishing to make oral comments at the workshop should notify the contact person in writing or by telephone no later than February 14, 1995. All requests to make oral comments should contain the name, address, telephone number, and organizational affiliation of the presenter. Depending on the time available and the number of requests to make oral comments, it may be necessary to limit the time of each presenter.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 95–2785 Filed 2–3–95; 8:45 am]

BILLING CODE 4163–18–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N–95–3860; FR 3848–N–02]

Notice of Fiscal Year 1995 Consolidated Formula Allocations for the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons With AIDS (HOPWA) Programs; Notice of Correction of Technical Errors

AGENCY: Office of the Assistant Secretary for Community Planning and Development (HUD).

ACTION: Notice of Technical Correction to Notice of Fiscal Year 1995 consolidated formula allocations for the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) programs.

SUMMARY: On January 25, 1995 (60 FR 5010), HUD published a Notice of Fiscal Year 1995 consolidated formula allocations for the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) programs. The purpose of this notice is to correct three nonsubstantive errors that appeared in the January 25, 1995 notice.

FOR FURTHER INFORMATION CONTACT: Appendix E to the January 25, 1995 notice, contains the name, address, and telephone number of each local HUD Field Office Community Planning and Development (CPD) Division Director. Hearing- or speech-impaired individuals may call HUD's TDD number (202) 708–9300 [This is not a toll-free number] or 1–800–877–8339 [This is a toll free number].

SUPPLEMENTARY INFORMATION: Prior to Fiscal Year 1995, HUD announced CDBG, HOME, ESG, and HOPWA formula allocations separately. On January 25, 1995 (60 FR 5010), HUD published a Notice of Fiscal Year 1995 consolidated formula allocations for the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) programs. The announcement of consolidated formula allocations on January 25, 1995, reflects the Department's commitment to the Consolidated Plan concept which was developed in joint partnership with state and local governments to address local problems more comprehensively.

In the January 25, 1995, there were three nonsubstantive (typographical/editorial) errors that are corrected by this notice for clarity purposes.

Accordingly, FR Doc. 95–1792, a Notice of Fiscal Year 1995 Consolidated Formula Allocations for the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Emergency Shelter Grants (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) Programs, published in the **Federal Register** on January 25, 1995 (60 FR 5010), is corrected as follows:

1. On page 5010, second column, in the first paragraph under the heading ''CONSOLIDATED PLAN SUBMISSION REQUIREMENTS,'' the notice referred to the date of publication of the Consolidated Submission for Community Planning and Development Programs final rule as December 30, 1994. The date of publication of this final rule was January 5, 1995 (60 FR 1878).

2. On page 5010, second column, in the third paragraph under the heading ''CONSOLIDATED PLAN SUBMISSION REQUIREMENTS,'' the notice provides that a jurisdiction must have a Consolidated Plan that is approved by HUD as a prerequisite to receiving funds directly from HUD with respect to each of these formula programs unless a *waiver* request has been submitted and approved by the local HUD Field Office. Consistent with the Consolidated Plan final rule, the phrase ''a waiver'' is corrected by substituting the phrase ''an exception.'' (See § 91.20 of the January 5, 1995 final rule; 60 FR 1898.)

3. On page 5010, third column, in the second line of the third paragraph, under the heading ''Community Development Block Grant (CDBG),'' the word ''that'' should be removed.

Dated: February 1, 1995.

Camille E. Acevedo,

Assistant General Counsel for Regulations.

[FR Doc. 95–2791 Filed 2–3–95; 8:45 am]

BILLING CODE 4210–29–P

Office of the Assistant Secretary for Housing-Federal Housing Commissioner

[Docket No. N–95–3878; FR–3861–N–01]

Mortgagee Review Board Administrative Actions

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: In compliance with Section 202(c) of the National Housing Act, notice is hereby given of the cause and description of administrative actions taken by HUD's Mortgagee Review Board against HUD-approved mortgagees.

FOR FURTHER INFORMATION CONTACT: William Heyman, Director, Office of Lender Activities and Land Sales Registration, 451 Seventh Street, S.W., Washington, D.C. 20410, telephone (202) 708-1515. The Telecommunication Device for the Deaf (TDD) number is (202) 708–4594. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: Section 202(c)(5) of the National Housing Act (added by Section 142 of the Department of Housing and Urban Development Reform Act of 1989 (Pub.L. 101-235), approved December 15, 1989) requires that HUD ''publish in the **Federal Register** a description of and the cause for administrative action against a HUD-approved mortgagee'' by the Department's Mortgagee Review Board. In compliance with the requirements of Section 202(c)(5), notice is hereby given of administrative actions that have been taken by the Mortgagee Review Board from July 1, 1994 through December 31, 1994.

1. Barton Funding Company, Inc.; Long Beach, CA

Action: Withdrawal of HUD–FHA mortgagee approval and proposed civil money penalty in the amount of $100,000.

Cause: A HUD monitoring review that disclosed violations of HUD–FHA requirements that included: failure to remit to HUD–FHA over 100 One-Time Mortgage Insurance Premiums (OTMIPs) collected from mortgagors and totalling over $223,000; failure to timely submit 129 loans for HUD–FHA mortgage insurance endorsement; failure to maintain an adequate Quality Control Plan; failure to comply with HUD–FHA reporting requirements under the Home Mortgage Disclosure Act (HMDA); and failure to maintain copies of HUD–1 Settlement Statements.

2. Mortgage Systems, Inc., Las Vegas, NV

Action: Proposed Settlement Agreement to be concluded within 60 days that includes payment of a civil money penalty in the amount of $15,000; indemnification to the Department for any claim losses on eight improperly originated loans; corrective action to assure compliance with HUD–FHA requirements; and transfer of the company to new ownership: if a Settlement Agreement is not concluded within the 60-day period, the HUD–FHA mortgagee approval shall be withdrawn and a civil money penalty in the amount of $75,000 proposed.

Cause: A HUD monitoring review that disclosed violations of HUD–FHA requirements that included: failure to comply with conditions of probation previously imposed by the Board; failure to implement an adequate Quality Control Plan; failure to timely remit OTMIPs; failure to submit closed loans for endorsement within 60 days after loan closing; failure to meet annual recertification requirements regarding amount of liquid assets; submission of alleged false information; failure to document the borrower's source of funds for downpayment and closing costs; failure to correctly calculate the borrower's income for loan approval; failure to ensure that the borrower made the minimum required investment; use of mortgage brokers to originate loans and payment of ''kickbacks'' to such brokers; non-compliance with HUD's conflict-of-interest prohibited payments provisions; failure to conduct face-to-face interviews; and allowing loan correspondents to close loans improperly.

3. G&R Financial Group, Plantation, FL

Action: Withdrawal of HUD–FHA approval.

Cause: Failure by the president of the company to comply with the terms and conditions of a Settlement Agreement with the Department, including reimbursement for claim losses of $181,521 incurred in connection with improperly originated HUD–FHA insured mortgages.

4. Hallmark Government Mortgage, Inc., Bellevue, WA

Action: Settlement Agreement that includes corrective action to assure compliance with HUD–FHA requirements.

Cause: HUD monitoring review that disclosed failure to maintain an adequate Quality Control Plan for the origination of HUD–FHA insured mortgages, and noncompliance with the Department's reporting requirements under the Home Mortgage Disclosure Act (HMDA).

5. Washington Capital Associates, Inc., Arlington, VA

Action: Review by Mortgagee Review Board with conclusion that no administrative action is warranted.

Cause: A HUD Office of Inspector General Audit Report citing underwriting deficiencies, and noncompliance with the Department's requirements concerning the review of insured multifamily project financial statements and monitoring of capital expenditures.

6. Neighborhood Acceptance Corporation, Costa Mesa, CA

Action: Probation and proposed civil money penalty in the amount of $5,000.

Cause: A HUD monitoring review that disclosed violations of HUD-FHA Title I property improvement program requirements that included: establishing a minimum loan amount; permitting loan brokers to participate in the origination of Title I loans; originating Title I loans in locations where the company was not approved by HUD-FHA to do Title I business; and approving a loan after improvements had been started.

7. Utah Mortgage Loan Corporation, Salt Lake City, UT

Action: Proposed Settlement Agreement which includes the payment of a civil money penalty in the amount of $3,000, indemnification to the Department for any claim loss on one improperly originated loan, and corrective action to assure compliance with HUD-FHA requirements.

Cause: A HUD monitoring review that cited violations of HUD-FHA requirements that included: failure to comply with the Department's reporting requirements under the Home Mortgage Disclosure Act (HMDA); failure to maintain an adequate Quality Control Plan; failure to maintain a fidelity bond and errors and omissions coverage; and improperly originating a HUD-FHA insured mortgage.

8. Home Owners Funding Corporation of America, Dallas, TX

Action: Proposed Settlement Agreement that includes: payment of a civil money penalty in the amount of $l0,000; indemnification to the Department for any claim losses in connection with l4 improperly originated Title I loans; and corrective action to assure compliance with HUD-FHA requirements.

Cause: A HUD monitoring review that disclosed violations of HUD-FHA Title I manufactured home loan program requirements which included: failure to report dealers to HUD-FHA for misstatements of facts on placement certificates; funding loans knowing that placement certificates contained false certifications; failure to determine borrowers' source of funds for downpayment; funding loans prior to dealer approval; failure to comply with dealer approval requirements; failure to comply with requirements for reporting loans for insurance; and failure to comply with the Department's reporting requirements under the Home Mortgage Disclosure Act (HMDA).

9. Seacoast Equities, Inc., La Mesa, CA

Action: Settlement Agreement that includes the payment of a civil money penalty in the amount of $l,000 and corrective action to assure compliance with HUD-FHA Title I program requirements.

Cause: A HUD monitoring review which disclosed violations of HUD-FHA requirements that included: failure to comply with the Department's reporting requirements under the Home Mortgage Disclosure Act (HMDA); using misleading advertisements regarding the Title I program; and requiring a minimum loan amount.

10. Kiddco Mortgage Company, Cincinnati, OH

Action: Letter of Reprimand and proposed civil money penalty in the amount of $1,000.

Cause: A HUD monitoring review that cited the company for bringing a defaulted loan current in order to process a streamline refinance, and making alleged false certifications to HUD-FHA.

11. Greater Chicago Mortgage Corporation, Chicago, IL

Action: Letter of Reprimand

Cause: Alteration of loan documents by a former employee of the company in connection with a HUD-FHA insured mortgage transaction and violation of HUD-FHA prepurchase counseling requirements with respect to the borrowers involved in the transaction.

12. T.A.B. Mortgage Corporation, Fort Lauderdale, FL

Action: Probation and proposed civil money penalty in the amount of $10,000.

Cause: A HUD monitoring review that disclosed violations of HUD-FHA requirements which included: failure to comply with HUD-FHA reporting requirements under the Home Mortgage

Disclosure Act (HMDA); charging a variation in mortgage interest rates that exceed two percent for FHA-insured mortgages based on mortgage amounts; failure to implement an adequate Quality Control Plan; requesting FHA case numbers using the mortgagee number of a lender that was not approved as a sponsor for the company; failure to provide information requested by HUD that was required to complete a review of the company's origination procedures; alleged submission of false information to HUD for loan approval and permitting the hand carrying of a Verification of Employment; and failure to respond to a findings letter issued by the Monitoring Division based upon a previous monitoring review.

13. J. I. Kislak Mortgage Corporation, Miami Lakes, FL

Action: Letter of Reprimand and proposed civil money penalty in the amount of $5,000.

Cause: Violation of HUD-FHA requirements by requiring as a condition of purchasing HUD-FHA insured mortgages from certain correspondent lenders, that the mortgages exceed a minimum loan amount.

14. Commercial Center Bank, Santa Ana, CA

Action: Settlement Agreement that includes indemnification to the Department for any claim losses in connection with improperly originated mortgages, corrective action to assure compliance with HUD-FHA requirements; and payment of a civil money penalty in the amount of $12,000.

Cause: A HUD monitoring review that disclosed violations of HUD-FHA requirements that included: making improper payments on defaulted loans to bring them current in order to submit them for HUD-FHA mortgage insurance; and submitting loans for insurance endorsement when payments had not been made within the month due.

15. Deposit Guaranty Mortgage Company, Jackson, MS

Action: Probation and proposed civil money penalty in the amount of $5,000.

Cause: A HUD monitoring review that cited violations of HUD-FHA requirements including: failure to timely remit One-Time Mortgage Insurance Premiums; failure to implement an adequate Quality Control Plan; failure to conduct a face-to-face interview with the borrower; and failure to maintain complete loan origination files.

16. Mortgagees not in Compliance With HUD-FHA Reporting Requirements Under The Home Mortgage Disclosure Act (HMDA)

Action: Letter of Reprimand and proposed civil money penalty in the amount of $1,000.

Cause: Failure to submit HMDA data to the Department. McKinney-Green, Inc., Gainesville, FL; First Security Mortgage & Investment Company, Inc., Pensacola, FL; Rocky Mountain Mortgage Ltd., Albuquerque, NM; Wellington Mortgage Corp., Beaver, PA; Mountain States Mortgage Center, Sandy, UT; Miracle Mortgage Service, Inc., Carson, CA; First Mortgage Services, Inc., Fargo, ND; Traditional Bankers Mortgage Corp., Ponce, PR; Peninsula Mortgage Bankers Corp., Coral Gables, FL; Fidelity Union Mortgage Corp., Christiansted, VI; Amerifirst Financial, Inc., Mesa, AZ.

Action: Letters of Reprimand and proposed civil money penalty of $2,000, which shall be reduced to $1,000 upon submission to the Department of HMDA data for 1993 by January 1, 1995.

Cause: Failure to submit HMDA data to the Department. Freyre Mortgage Corp., Santurce, PR; Alameda Mortgage Corp., Castro Valley, CA; Golden State Mortgage Corp., San Jose, CA.

Dated: January 26, 1995.

Jeanne K. Engel,

General Deputy Assistant Secretary Housing—Federal Housing Commissioner.

[FR Doc. 95–2772 Filed 2–3–95; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–030–95–1610–00]

Notice of Intent To Amend the Lahontan, Walker, and Shoshone-Eureka Resource Management Plans

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent to prepare a plan amendment and environmental assessment and invitation for public participation.

SUMMARY: The Carson City and Battle Mountain Districts of the Bureau of Land Management propose to amend the Lahontan, Walker and Shoshone-Eureka Resource Management Plans to address communication sites. The amendment will cover public lands in central Nevada in parts of Churchill, Mineral, Lander, Nye and Eureka Counties.

DATES AND ADDRESSES: Written comments on the proposed amendment and environmental assessment are welcomed until March 24, 1995. They should be sent to James M. Phillips, U.S. Bureau of Land Management, 1535 Hot Springs Road, Carson City, NV 89706. Public open houses to discuss the amendment will be held from 4 p.m. to 8 p.m. on March 6 at the Bureau of Land Management office, 1535 Hot Springs Road, Carson City; on March 7 at the High School Library, Highway 305, North, Austin at and on March 8 at the Convention Center, 100 Campus Way, Fallon. Please call James M. Phillips at 702 885–6100 for further information.

SUPPLEMENTARY INFORMATION: The public is invited to participate in the identification of issues related to the development of future communication sites in central Nevada. This plan amendment is being proposed to address the rapid increase in the demand for communication sites. Most of this increase is related to the expansion of training activities at the Fallon Naval Air Station. Since 1980, a total of 68 Navy sites have been constructed on public lands administered by the Bureau of Land Management. Over 200 miles of powerlines, roads and fiber-optic cables associated with the sites were also constructed. The proposed plan amendment will address future site development in central Nevada. It will identify zones where communication site development is appropriate and where it is not. Site development guidelines will also be considered. Anticipated issues for the amendment and environmental assessment are: visual impacts, noise from aircraft and health/environmental impacts from military chaff drops associated with the sites.

Planning documents and other pertinent materials may be examined at the Bureau of Land Management offices in Carson City and Battle Mountain between 7:30 a.m. and 4:15 p.m. Monday through Friday.

Dated this 30th day of January, 1995.

James M. Phillips,

Area Manager, Lahontan Resource Area.

[FR Doc. 95–2783 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–HC–P

[AZ-930–1430–00; AZA–28642]

Notice of Proposed Withdrawal and Opportunity for Public Meeting, Arizona; Correction

In notice document 94–21859 (filed 9/2/94), beginning on page 46060 in the issue of Tuesday, September 6, 1994,

make the following corrections: On page 46061, first column, under Private Land, Lines 9 and 10, the legal descriptions should be changed from ''Sec. 15; S½, and Sec. 16; S½.'' to read ''Sec. 15; N½. and Sec. 16; N½.''

Dated: January 17, 1995.

Herman L. Kast,

Deputy State Director, Lands and Renewable Resources.

[FR Doc. 95–2826 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–32–P

[AZ–930–1430–01; AZA–26553, AZA–28900]

Notice of Withdrawal of Application, Case Closed; Proposed Withdrawal and Opportunity for Public Meeting; Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of Agriculture, Forest Service, has withdrawn application AZA–26553 and has filed application AZA–28900 in its place. Application AZA–26553, a withdrawal application for 4,220.00 acres of National Forest System land, covered only a portion of the land identified for eventual withdrawal; therefore, in order to keep the project complete, the Forest Service withdrew application AZA–26553 and filed application AZA–28900. Upon publication of this notice in the **Federal Register** file AZA–26553 will be closed. All reference will now be to AZA–28900. All land is national forest land located along State Highway 87 between Phoenix and Payson. Application AZA–28900 requests the proposed withdrawal of approximately 7,500.00 acres of National Forest System lands. The purpose of the withdrawal is to protect the foreground area along the route of this major State highway. This application is in compliance with regulations found in 43 CFR 2310.1.2 and the Tonto National Forest plan. Publication of this notice closes the land for up to 2 years from location and entry under the United States mining laws only, the land will remain open to all other uses applicable to National Forest System lands.

DATE: Comments and requests for a meeting should be received on or before May 8, 1995.

ADDRESSES: Comments and meeting requests should be sent to the Arizona State Director, Bureau of Land Management (BLM), 3707 North 7th Street, Phoenix, Arizona 85014–5080.

FOR FURTHER INFORMATION CONTACT: John Mezes, BLM, Arizona State Office, 602–650–0509.

SUPPLEMENTARY INFORMATION: On December 7, 1994, the U.S. Department of Agriculture, Forest Service, filed application AZA–28900 to withdraw the following described National Forest System lands from location and entry under the United States mining laws, subject to valid existing rights. The legal description of the proposed mineral withdrawal is as follows: A strip of land that is 1320 feet from the center of the Department of Transportation easements on State Highway 87 within the following sections:

Gila and Salt River Meridian

T. 7 N., R. 9 E.,
  Sec. 1, W½;
  Sec. 11, S½SW¼, NE¼SE¼;
  Sec. 12, NW¼, N½SW¼;
  Sec. 14, NW¼NW¼;
  Sec. 15, NE¼NE¼.
T. 8 N., R. 9 E.,
  Sec. 36, SE¼SW¼.
T. 8 N., R. 10 E.,
  Sec. 5, lot 3, E½SW¼NW¼, SE¼NW¼, W½NE¼SW¼, N½NE¼SW¼SW¼, S½SE¼SW¼SW¼;
  Sec. 7, E½SE¼NE¼, SE¼;
  Sec. 8, SW¼NW¼NW¼, W½NE¼NW¼NW¼;
  Sec. 17, SW¼SW¼SW¼;
  Sec. 18, E½;
  Sec. 20, W½;
  Sec. 29, W½, W½W½SE¼;
  Sec. 31, lot 3, SE¼NE¼, NE¼SW¼, NW¼SE¼,
  Sec. 32, NW¼NW¼.
T. 9 N., R. 10 E.,
  Sec. 3, lots 3 and 4, S½NW¼;
  Sec. 4, lots 1 to 4 inclusive, S½N½;
  Sec. 5, lots 1 and 2, S½NE¼, SE¼;
  Sec. 8, N½, SW¼;
  Sec. 9, E½, E½SW¼;
  Sec. 10, NW¼;
  Sec. 16, N½, NW¼SW¼;
  Sec. 17, W½, SE¼SE¼NE¼;
  Sec. 20, N½;
  Sec. 32, W½.
T. 10 N., R. 10 E.,
  Sec. 9, SE¼SW¼, SW¼SE¼;
  Sec. 16, E½, E½E½W½;
  Sec. 21, E½, E½E½W½;
  Sec. 22, W½SW¼NW¼, W½NW¼SW¼;
  Sec. 28, NE¼, S½;
  Sec. 33, NW¼, S½;
  Sec. 34, SW¼.

The areas described aggregate approximately 7,500.00 acres of National Forest System lands in Maricopa and Gila Counties. The lands are located within the Tonto Basin and Payson Ranger Districts of the Tonto National Forest.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that at least one public meeting is required by regulation found in 43 CFR 2310.3–1(2)(v). Time and date of the meeting will be announced at a later date and will be published in the **Federal Register** at least 30 days before the scheduled meeting date. All interested persons who desire being heard at this meeting must submit a written request to the undersigned officer within 90 days from the date of publication of this notice.

The application will be processed in accordance with regulations as set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the lands will be segregated as specified above unless an application is denied or cancelled or the withdrawal is approved prior to that date. The temporary uses which will be permitted during this segregative period are all those applicable to U.S. Forest Service administered lands except those under the mining laws.

The temporary segregation of the lands in connection with this application shall not affect the administrative jurisdiction over the lands.

Dated: January 20, 1995.

Herman L. Kast,

Deputy State Director, Lands and Renewable Resources.

[FR Doc. 95–2827 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–32–P

Fish and Wildlife Service

Receipt of Application(s) for Permit

The following applicant has applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)

PRT–798633

Applicant: Paul Turner, Druid Environmental, Austin, TX

The applicant requests a permit to include take activities for the Houston toad (*Bufo houstonensis*), red-cockaded woodpecker (*Picoides borealis*), black-capped vireo (*Vireo atricapillus*), golden-cheeked warbler (*Dendroica chrysoparia*), and piping plover (*Charadrius melodus*) for the purpose of scientific research and survival of the species as prescribed by Service recovery documents.

ADDRESSES: Written data or comments should be submitted to the Assistant

Regional Director, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103, and must be received by the Assistant Regional Director within 30 days for the date of this publication.

Documents and other information submitted with this application are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the above office within 30 days of the date of publication of this notice. (See **ADDRESSES** above.)

Susan MacMullin,

Acting Regional Director, Region 2.

[FR Doc. 95–2780 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–55–M

Receipt of Application(s) for Permit

The following applicant has applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)

PRT–698579

Applicant: Everett Laney, Corps of Engineers, Tulsa District, Tulsa, OK

The applicant requests a permit to include take activities for the American burying beetle (*Nicrophorus americanus*) and red-cockaded woodpecker (*Picoides borealis*) for the purpose of scientific research and recovery actions as prescribed by Service recovery documents.

ADDRESSES: Written data or comments should be submitted to the Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103, and must be received by the Assistant Regional Director within 30 days from the date of this publication.

Documents and other information submitted with this application are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the above office within 30 days of the date of publication of this notice. (See **ADDRESSES** above.)

Susan MacMullin,

Acting Regional Director, Region 2, Albuquerque, NM.

[FR Doc. 95–2784 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–55–M

Notice of Availability of a Draft Revised Recovery Plan for the Piping Plover, Atlantic Coast Population, for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service announces the availability for public review of a draft Revised Recovery Plan for the Piping Plover (*Charadrius melodus*), Atlantic Coast Population. This population of piping plover, a small North American shorebird, breeds on Atlantic Coast beaches from Newfoundland to North Carolina and winters along the Atlantic Coasts from North Carolina south, along the Gulf Coast, and in the Caribbean. The population was listed as threatened in 1986, and the original recovery plan was approved in 1988. The revised plan draft modifies the recovery goal and recommends recovery activities that should continue or be initiated. If the revised plan is successfully implemented, full recovery may be achieved by 2010. The Service solicits review and comment from the public on this draft Plan.

DATES: Comments on the draft Recovery Plan must be received May 8, 1995, to receive consideration by the Service.

ADDRESSES: Persons wishing to review the draft Recovery Plan can obtain a copy from the U.S. Fish and Wildlife Service, Region Five, 300 Westgate Center Drive, Hadley, Massachusetts 01035, (telephone 413/253–8628). Comments should be sent to the U.S. Fish and Wildlife Service, Weir Hill Road, Sudbury, Massachusetts 01776 (telephone 508/443–4325 and fax 508/443–2898), to the attention of Anne Hecht.

FOR FURTHER INFORMATION CONTACT: Anne Hecht at 508/443–4325 (see Addresses).

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the U.S. Fish and Wildlife Service's endangered species program. To help guide the recovery effort, the Service is working to prepare Recovery Plans for most of the listed species native to the United States. Recovery Plans describe actions considered necessary for conservation of the species, establish criteria for the recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*) requires the development of Recovery Plans for listed species unless such a Plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during Recovery Plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised Recovery Plan. The Service and other Federal agencies will also take these comments into account in the course of implementing Recovery Plans.

The document submitted for review is the draft Piping Plover (*Charadrius melodus*), Atlantic Coast Population, Revised Recovery Plan. The piping plover is a small shorebird listed as threatened in its Atlantic Coast and Great Plains breeding ranges and endangered in the Great Lakes watershed. To facilitate recovery of this wide-ranging but dwindling species, two separate recovery programs, one for the Atlantic Coast population and one for inland-nesting piping plovers, have been established. This plan deals only with piping plovers that breed on Atlantic coast beaches from Newfoundland to North Carolina. These birds, and those from inland populations, winter along the Atlantic Coast from North Carolina south, along the Gulf Coast, and in the Caribbean.

The Atlantic Coast piping plover population has increased from approximately 800 pairs since its listing in January 1986 to 1150 pairs in 1994. However, most of the apparent increase between 1986 and 1989 was attributed to increased survey effort in two states, and the population increase between 1989 and 1994 has been unevenly distributed. Since 1989, the New England subpopulation has increased 244 pairs, while the New York-New Jersey subpopulation gained 14 pairs, and the Southern (DE-MD-VA-NC) and Atlantic Canada subpopulations declined by 13 and 51 pairs, respectively. Substantially higher productivity rates have also been observed in New England than elsewhere in the population's range. Furthermore, recovery is occurring in the context of an extremely intensive protection effort now being implemented on an annual basis. Pressure on Atlantic Coast beach habitat from development and human disturbance is pervasive and

unrelenting, and the species is sparsely distributed.

Piping plovers nest above the high tide line on coastal beaches, sandflats at the ends of sandspits and barrier islands, gently sloping foredunes, blowout areas behind primary dunes, and washover areas cut into or between dunes. Feeding areas include intertidal portions of ocean beaches, washover areas, mudflats, sandflats, wrack lines, sparsely vegetated dunes, and shorelines of coastal ponds, lagoons or salt marshes. Wintering plovers on the Atlantic Coast are generally found at accreting ends of barriers islands, along sandy peninsulas, and near coastal inlets.

Loss and degradation of habitat due to development and shoreline stabilization have been a major contributors to the species' decline. Disturbance by humans and pets often reduces the functional suitability of habitat and causes direct and indirect mortality of eggs and chicks. Predation has also been identified as a major factor limiting piping plover reproductive success at many Atlantic Coast sites, and substantial evidence shows that human activities are affecting types, numbers, and activity patterns of patterns of predators, thereby exacerbating natural predation.

The draft under review is a revision of a recovery plan that was approved in 1988. Since that time, important new information regarding piping plover survival and fecundity rates, habitat carrying capacity, and dispersal within the population has become available, facilitating re-evaluation of the original recovery goal. With the assistance of experts in computerized population viability modeling, the Atlantic Coast piping plover recovery team has performed extensive analyses of the 1988 recovery goal, which called for ''a self-sustaining population of 1200 breeding pairs while maintaining the current distribution.'' The result of these analyses is a revised recovery goal based upon the following delisting criteria: (1) Increase and maintain for five years a total of 2,000 breeding pairs, distributed among four recovery units as follows: Atlantic Canada, 400 pairs; New England, 625 pairs; New York-New Jersey, 575 pairs; Southern (DE–MD–VA–NC), 400 pairs. (2) Verify the adequacy of a 2000 pair population of piping plovers to maintain heterozygosity and allelic diversity over the long term. (3) Achieve a five-year average productivity rate of 1.5 fledged chicks per pair in each of the four recovery units described in criterion 1, based on data from sites that collectively support at least 90% of the recovery unit's population. (4) Institute long-term agreements to assure protection and management sufficient to maintain the target populations and average productivity in each recovery unit. (5) Assure long-term maintenance of wintering habitat, sufficient in quantity and quality to maintain survival.

Experience gained since the 1988 plan was prepared has also resulted in refinements of activities needed to meet these recovery criteria. Continuing and proposed recovery activities include: management of piping plover populations and breeding habitat to maximize survival and productivity, monitoring and management of wintering and migration areas to maximize survival and recruitment into the breeding population, scientific investigations to facilitate recovery efforts, and public information and education programs.

Guidance appended to the new plan includes: (a) Summary of current and needed management activities at each current and potential breeding site; (b) guidelines for managing recreational activities in piping plover breeding habitat to avoid take; and (c) guidelines for preparation and evaluation of applications for permits for incidental take of piping plovers that will allow steady continued progress towards recovery.

The 118% increase in the New England population between 1989 and 1994 demonstrates that rapid recovery of the Atlantic Coast piping plover is possible with intensive protection efforts. Contingent, on vigorous implementation of all recovery tasks, full recovery is anticipated by the year 2010.

The draft Recovery Plan revision is being submitted for agency review. After consideration of comments received during the review period, the Plan will be submitted for final approval.

Public Comments Solicited

The Service solicits written comments on the Recovery Plan described. All comments received by the data specified above will be considered prior to approval of the Plan.

Authority: The authority for this action is Section 4(f) of the Endangered Species Act, 16 U.s.C. 1533(f).

Dated: January 26, 1995.

Cathy Short,

Acting Regional Director.

[FR Doc. 95–2935 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–55–M

National Park Service

Supplemental Record of Decision; General Management Plan—Eugene O'Neill National Historic Site Contra Costa County, California

On April 1, 1991, the National Park Service issued a Record of Decision (ROD) on the Final Environmental Impact Statement/General Management Plan for the Eugene O'Neill National Historic Site (Site). In the ROD, the National Park Service (NPS) announced that it intended to implement the proposed alternative (Alternative AA). The NPS selected Alternative AA based on the information contained in the Final Environmental Impact Statement (FEIS), which was issued on February 15, 1991.

The National Park Service (NPS) would like to clarify that in implementing Alternative AA, the NPS has no present intention to acquire and condemn a portion of the former Kleinfelder property which is currently being used for landscaping and driveway access. (A map depicting this parcel can be found at the offices of the Superintendent, Eugene O'Neill National Historic Site at the address below.) This Supplemental Record of Decision does not affect any other portions of the April 1, 1991 Record of Decision.

The National Park Service has determined that this clarification to the ROD does not constitute a substantial change to Alternative AA, nor does it reflect significant new circumstances which are relevant to environmental concerns. Therefore, no supplement to the FEIS is required.

Any questions regarding this matter should be directed to Mr. Glenn Fuller, Superintendent, Eugene O'Neill National Historic Site, P.O. Box 280, 1000 Kuss Road, Danville, California 94526.

Dated: December 30, 1994.

Phil H. Ward,

Regional Director, Western Region.

[FR Doc. 95–2741 Filed 2–3–95; 8:45 am]

BILLING CODE 4310–70–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–371]

Notice of Investigation

In the Matter of: Certain Memory Devices With Increased Capacitance and Products Containing Same

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 30, 1994, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Emanuel Hazani, 1210 Sesame Drive, Sunnyvale, California 94087 and Patent Enforcement Fund, Inc., 1095 Sasco Hill Road, Fairfield, Connecticut 06430. Supplements were filed on January 9 and 19, 1995. The complaint, as supplemented, alleges a violation of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain memory devices with increased capacitance and products containing same by reason of infringement of claims 1–2, 4–23 and 25–28 of U.S. Letters Patent 5,166,904, and that an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after a hearing, issue a permanent exclusion order and a permanent cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Room 112, Washington, DC 20436, telephone 202–205–1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

FOR FURTHER INFORMATION CONTACT: John M. Whealan, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2574.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.10 of the Commission's final rules of practice and procedure (59 FR 39020, 39043, August 1, 1994).

SCOPE OF INVESTIGATION: Having considered the complaint, the U.S. International Trade Commission, on January 30, 1995, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation or the sale within the United States after importation of certain memory devices with increased capacitance and products containing same by reason of infringement of claims 1, 2, 4–23, 25–27 or 28 of U.S. Letters Patent 5,166,904, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

Emanuel Hazani, 1210 Sesame Drive, Sunnyvale, California 94087

Patent Enforcement Fund, Inc., 1095 Sasco Hill Road, Fairfield, Connecticut 06430

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Mitsubishi Electric Corporation, 2–3, Marunouchi, 2-chome, Chiyoda-ku, Tokyo 100, Japan

Mitsubishi Electric America, Inc., 5665 Plaza Drive, Cypress, California 90630–0007

NEC Corporation, 7–1 Shiba, 5-chome, Minato-ku, Tokyo 108–01, Japan

NEC Electronics, Inc., 475 Ellis Street, Mountain View, California 94043

Oki Electric Industry, Co., Ltd., 7–12 Toranomon, 1-chome, Minato-ku, Tokyo 105, Japan

Oki America, Inc., Three University Plaza, Hackensack, New Jersey 07601

Hitachi, Ltd., 6 Kanda-Surugadai 4-chome, Chiyoda-ku, Tokyo 101, Japan

Hitachi America, Ltd., 50 Prospect Avenue, Tarrytown, New York 10591

Samsung Electronics Co., Ltd., C.P.O. Box 2775, 10–20th Floors, Joong-ang Daily News Bldg. 7, Soonhwa-dong, Chung-ku, Seoul, Korea

Samsung Electronics America, Inc., 105 Challenger Road, Ridgefield Park, New Jersey 07660

Samsung Semiconductors, Inc., 3655 North 1st Street, San Jose, California 95134–1708

Hyundai Electronics Industries, Co., Ltd., 140–2, Gye-Dong, Chongro-Ku, Seoul, Korea

Hyundai Electronics America, Inc., 166 Baypointe Parkway, San Jose, California 95134

(c) John M. Whealan, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401–P, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's final rules of practice and procedure. 59 FR 39020, 39045, August 1, 1994. Pursuant to 19 CFR § 201.16(d) and § 210.13(a) of the Commission's Final Rules (59 FR at 39045), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondents to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: January 31, 1995.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 95–2825 Filed 2–3–95; 8:45 am]

BILLING CODE 7020–02–P

[Investigation No. 337–TA–370]

Certain Salinomycin Biomass and Preparations Containing Same; Notice of Investigation

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337 and provisional acceptance of motion for temporary relief.

SUMMARY: Notice is hereby given that a complaint and a motion for temporary relief were filed with the U.S. International Trade Commission on December 23, 1994, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Kaken Pharmaceutical Company, Ltd., 2–28–8 Honkomagome, Bunkyo-ku, Tokyo 113, Japan. A revised complaint and revised memorandum of points and authorities

in support of the motion for temporary relief were filed on January 18, 1995. The complaint, as revised, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain salinomycin biomass and preparations containing same alleged to be manufactured abroad by a method covered by claim 2 of U.S. Letters Patent Re. 34,698 and alleged to incorporate ''know-how'' and improvements in breach of contract. The complaint further alleges that there exists an industry in the United States and that the domestic industry is being injured or threatened with injury by the imported accused products. The complainant requests that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and a permanent cease and desist order.

The motion for temporary relief requests that the Commission issue a temporary exclusion order and temporary cease and desist orders prohibiting the importation into and the sale within the United States after importation of salinomycin biomass and preparations containing same that infringe claim 2 of the '698 patent during the course of the Commission's investigation.

ADDRESSES: The nonconfidential complaint and motion for temporary relief are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

FOR FURTHER INFORMATION CONTACT: Teresa M.B. Martinez, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2015.

AUTHORITY: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.10 of the Commission's final rules of practice and procedure. (59 FR 39020, 39043–44 (Aug. 1, 1994).) The authority for provisional acceptance of the motion for temporary relief is contained in § 210.58. (59 FR at 39062.)

SCOPE OF INVESTIGATION: Having considered the complaint and the motion for temporary relief, the U.S. International Trade Commission, on January 30, 1995, Ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation or the sale within the United States after importation of certain salinomycin biomass and preparations containing same made abroad by a process covered by claim 2 of U.S. Letters Patent Re. 34,698; and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

(2) Pursuant to § 210.58 of the Commission's final rules of practice and procedure (59 FR 39020, 39062 (Aug. 1, 1994)), the motion for temporary relief under subsection (e) of section 337 of the Tariff Act of 1930, which was filed with the complaint, be provisionally accepted and referred to an Administrative Law Judge.

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

Kaken Pharmaceutical Company, Ltd., 2–28–8 Honkomagome, Bunkyo-ku, Tokyo 113, Japan

(b) The respondents are the following companies alleged to be in violation of Section 337, and are the parties upon which the complaint and motion for temporary relief are to be served:

Hoechst Aktiengesellschaft, Bruningstrasse 50, 65929 Frankfurt, Germany

Hoechst Veterinar, Gesellschaft m.b.H., Feldstrasse 1a. 85716, Unterschleissheim B., Munich, Germany

Hoechst-Roussell Agri-Vet Co., Route 202–206 North, Sommerville, New Jersey 08876–1258

Merck & Company, Inc., 1 Merck Drive, P.O. Box 100, White House Station, New Jersey 08889–0100

(c) Teresa M.B. Martinez, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW, Room 401–D, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(4) For the investigation and temporary relief proceedings instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint, the motion for temporary relief, and the notice of investigation must be submitted by the named respondent in accordance with §§ 210.13 and 210.59 of the Commission's final rules of practice and procedure. (59 FR at 39045–46, 39062.) Pursuant to 19 CFR 201.16(d), as well as sections 210.13(a) and 210.59 of the Commission's final rules of practice and procedure (59 FR at 39045, 39062–63), such responses will be considered by the Commission if received not later than 10 days after the date of service of the complaint. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of the respondent to file a timely response to the patent-based allegations in the complaint, to the motion for temporary relief, and to this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint, motion for temporary relief, and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: January 31, 1995.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 95–2823 Filed 2–3–95; 8:45 am]

BILLING CODE 7020–02–P

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32657]

Iron Road Railways Incorporated and Bangor and Aroostook Acquisition Corporation—Control Exemption—Bangor and Aroostook Railroad Company and Canadian American Railroad Company

AGENCY: Interstate Commerce Commission.

ACTION: Notice of Exemption.

SUMMARY: The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 11343–11345 the acquisition of control by Iron Road Railways Incorporated and Bangor and Aroostook Acquisition Corporation of two rail carriers, the Bangor and Aroostook Railroad Company and the Canadian American Railroad Company. The exemption is subject to standard labor protective conditions.

DATES: This decision will be effective on February 1, 1995. Petitions to reopen must be filed by February 21, 1995.

ADDRESSES: Send pleadings referring to Finance Docket No. 32657 to: (1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, 1201 Constitution Avenue, NW., Washington, DC 20423; and (2) James E. Howard, One International Place, Boston, MA 02110.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–5610. [TDD for the hearing impaired: (202) 927–5721].

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, 1201 Constitution Avenue, NW., Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services at (202) 927–5721].

Decided: January 30, 1995.

By the Commission, Chairman McDonald, Vice Chairman Morgan, Commissioners Simmons and Owen.

Vernon A. Williams,

Secretary.

[FR Doc. 95–2813 Filed 2–3–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32654]

Toledo, Peoria & Western Railway Corporation—Trackage Rights Exemption—Peoria and Pekin Union Railway Co.

Peoria and Pekin Union Railway Company (P&PU) has agreed to grant overhead trackage rights to Toledo, Peoria & Western Railway Corporation (TP&W), over 4.7 miles of P&PU's rail line between TP&W milepost 109.4 at East Peoria, IL, and TP&W milepost 113.9 at Peoria, IL. The purpose of this transaction is to enable TP&W to connect its eastern rail lines between Logansport, IN, and East Peoria, IL, with its western rail lines between Peoria and Fort Madison, IA. The trackage rights were to become effective on or after January 27, 1995.[1]

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Karl Morell, Suite 1035, 1101 Pennsylvania Avenue, NW., Washington, DC 20004.

As a condition to the use of this exemption, any employees adversely affected by the trackage rights will be protected under Norfolk and Western Ry. Co—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980).

Decided: January 31, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–2853 Filed 2–3–95; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32656]

Missouri Pacific Railroad Company—Trackage Rights Exemption—Union Pacific Railroad Company

Union Pacific Railroad Company (UP) has agreed to grant approximately 19.09 miles of overhead and local trackage rights in Saline County, KS, to Missouri Pacific Railroad Company (MP), its corporate affiliate. The trackage extends: (1) Over 16.92 miles on UP's McPherson Branch from milepost 534.75 near Bridgeport, KS, to the end of the line at milepost 551.67 near Salina, KS (which also equals milepost 185.92 on UP's Salina Branch); and (2) over 2.17 miles on UP's Salina Branch from milepost 185.92 to milepost 183.75, near Salina. The proposed transaction will allow movement of MP's trains in overhead service and also will permit MP to serve shippers located adjacent to UP's line of railroad.

The transaction was scheduled to be consummated on, or as soon as possible after, January 24, 1995.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission and served on: Joseph D. Anthofer, 1416 Dodge St., Omaha, NE 68179.

As a condition to the use of this exemption, any employees adversely affected by the trackage rights will be protected under Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980).

Decided: January 31, 1995.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 95–2852 Filed 2–3–95; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Application

Pursuant to § 1301.43(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on December 16, 1994, Orpharm, Inc., 728 West 19th Street, Houston, Texas 77008, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Methadone (9250)	II
Methadone intermediate (9254)	II
Levo-alphacetylmethadol (9648)	II

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the above application and may also file a written request for a hearing thereon in accordance with 21 CFR 1301.54 and in the form prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than March 8, 1995.

Dated: January 24, 1995.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 95–2816 Filed 2–3–95; 8:45 am]

BILLING CODE 4410–09–M

[1] P&PU canceled a prior trackage rights agreement on February 9, 1993, and asked the Commission to set the compensation for TP&W's continued use of the trackage rights. The parties subsequently entered into the agreement that is the subject of this notice. Accordingly, the compensation proceeding is being held in abeyance and will be dismissed on July 25, 1995, if no party requests further action. See Toledo, Peoria & Western Railway Corp.—Trackage Rights Compensation—Peoria and Pekin Union Railway Company, Finance Docket No. 26476 (Sub-No. 1) (ICC served Jan. 25, 1995).

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 95–016]

Government-Owned Inventions; Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are owned by the U.S. Government and are available for domestic, and possibly, foreign licensing.

Copies of patent applications cited are available from the National Technical Information Service, Springfield, VA 22161. Requests for copies of patent applications must include the patent application serial number. Claims are deleted from the patent applications sold to avoid premature disclosure.

DATES: Date published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: National Aeronautics and Space Administration, Harry Lupuloff, Director of Patent Licensing, Code GP, Washington, DC 20546, telephone (202) 358–2041, fax (202) 358–4341.

Patent Application 08/332,188: A Method of Testing and Predicting Failures on an Electronic System;
filed October 17, 1994

Patent Application 08/330,144: Method for Measuring Surface Shear Stress Magnitude & Direction Using Liquid Crystal Coating;
filed October 20, 1994

Patent Application 08/332,173: Method and Apparatus for Producing Energy by Nuclear Fusion;
filed October 31, 1994

Patent Application 08/317,443: Autonomous Navigation Apparatus for a Mobile Vehicle;
filed October 4, 1994

Patent Application 08/328,762: Method and Apparatus for Improved Spatial Light Modulation;
filed October 24, 1994

Patent Application 08/319,142: Vacuum Holding Fixture and Method for Fabricating Piezoelectruc Polymer Acoustic Sensors;
filed October 4, 1994

Patent Application 08/320,622: Micro Heat Pipe Panels and Method for Producing Same;
filed October 6, 1994

Patent Application 08/326,804: Piezoelectric Loud Speaker;
filed October 11, 1994

Patent Application 08/323,943: Passive Fetal Heart Rate Monitoring Apparatus and Method with Enhanced Fetal Heart Beat Discrimination;
filed October 13, 1994

Patent Application 08/000,000: A Device for Testing Cables;
filed October 14, 1994

Patent Application 08/325,723: Joint for A Variable Geometry Truss and Method of Constructing Same;
filed October 14, 1994

Patent Application 08/000,000: Method of Desulphurization of Gas Turbine Blades;
filed October 17, 1994

Patent Application 08/327,061: Base Passive Porosity for Drag Reduction;
filed October 19, 1994

Patent Application 08/000,000: Imide Oligomers Endcapped with Phenylethynyl Phthalic Anhydrides and Polymers Therefrom;
filed October 28, 1994

Patent Application 08/000,000: Compact Solar Simulator with A Small Substense Angle and Controlled Magnification Optics;
filed October 1, 1994

Patent Application 08/331,067: A Method and Apparatus for Producing a substrate with Secondary Emissions;
filed October 26, 1994

Patent Application 08/331,067: A Method of Making a Nickel Fiber Electrode for a Nickel Based Battery System;
filed October 27, 1994

Patent Application 08/328,947: Diamond Composite Films for Protective Coatings on Metals and Method of Formation;
filed October 25, 1994

Patent Application 07/926,117: System for Determining Aero-Dynamic Imbalance;
filed August 7, 1992

Patent Application 08/061,401: Self-Generating Oscillating Pressure Device;
filed May 13, 1993

Patent Application 08/061,401: Aircraft Maneuver Envelope Warning System;
filed March 16, 1993

Patent Application 07/949,199: Retroreflector Array for Precision Laser Ranging;
filed September 30, 1992

Patent Application 08/008,424: Flex-Gears Power Transmission System;
filed January 25, 1993

Patent Application 08/111,230: Optically Broadcasting Wind Direction Indicator;
filed August 23, 1993

Patent Application 08/045,337: Airplane Take-Off and Landing Performance Monitoring System;
filed April 6, 1993

Patent Application 07/988,082: Method and Apparatus for Detection and Control of Prelasing in a Q-Switched Laser;
filed December 3, 1992

Patent Application 08/081,893: Pulsed Mode Cathode;
filed June 25, 1993

Patent Application 08/033,512: Wavelength Division Multi-Plexed Optical Integrated With Vertical Diffraction Grating;
filed March 17, 1993

Patent Application 08/020,813: Aberration Correction of Unstable Resonators;
filed February 22, 1993.

Dated: January 27, 1995.

Edward A. Frankle,

General Counsel.

[FR Doc. 95–2743 Filed 2–3–95; 8:45 am]

BILLING CODE 7510–01–M

[Docket No. 95–018]

NASA Advisory Council (NAC), Aeronautics Advisory Committee (AAC): Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act. Pub. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Aeronautics Advisory Committee.

DATES: March 9, 1995, 8 a.m. to 4:30 p.m.

ADDRESSES: National Aeronautics and Space Administration, Room 7H46, 300 E Street, S.W. Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Mary-Ellen McGrath, Office of Aeronautics, National Aeronautics and Space Administration, Washington, DC 20546 (202/358–4729).

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Aeronautics Update
—Federal Laboratory Review Report
—Streamling & Roles/Missions Design Status
—Aeronautics National Leadership Strategy
—FY97 Program/Budget Devleopment Strategy Status Report
—Government Engine Core Program

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Dated: January 31, 1995.

Timothy M. Sullivan,

Advisory Committee Management Officer.

[FR Doc. 95–2745 Filed 2–3–95; 8:45 am]

BILLING CODE 7510–01–M

[Notice 95–017]

Solar System Exploration Subcommittee of the Space Science Advisory Committee

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council. Space Science Advisory Committee, Solar System Exploration Subcommittee.

DATES: Wednesday, March 1, 1995, 8:30 a.m. to 5 p.m.; and Thursday, March 2, 1995, 8:30 a.m. to 3:30 p.m.

ADDRESSES: NASA Headquarters, 300 E Street, SW, Conference Room MIC 6A, West, (March 1) Conference Room MIC 5A, West, (March 2) Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: William L. Piotrowski, Code SL, National Aeronautics and Space Administration, Washington, DC 205 46, (202) 358–0316.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Overview of Solar System Exploration Division Status

—Mission Reports

—Advanced Study Reports

—Technology Report

—Complex Report

—Strategic Planning Approach

—Discussion and Formulation of Recommendations/Action Items

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: January 31, 1995.

Timothy M. Sullivan,

Advisory Committee Management Officer.

[FR Doc. 95–2744 Filed 2–3–95; 8:45 am]

BILLING CODE 7510–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–413]

Duke Power Company, et al.; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–35 issued to Duke Power Company (the licensee) for operation of the Catawba Nuclear Station, Unit 1, located in York County, South Carolina.

The proposed amendment would change Technical Specification (TS) 3.6.1.2 to defer the next scheduled containment integrated leak rate test (ILRT) at Catawba Unit 1 for one outage, from the end-of-cycle (EOC) 8 refueling outage (scheduled for February 1995) to EOC 9 (scheduled for June 1996). Title 10 of the Code of Federal Regulations, part 50, Appendix J, requires that three ILRTs be performed at approximately equal intervals during each 10-year service period at a nuclear station. ''Approximately equal intervals'' is defined in Catawba's TS as 40 plus or minus 10 months. The proposed one-time change would allow Catawba to extend that interval to 60 plus or minus 10 months.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

The following analysis is presented, pursuant to 10 CFR 50.91, to demonstrate that the proposed change will not create a Significant Hazard Consideration.

1. The proposed change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

Containment leak rate testing is not an initiator of any accident; the proposed interval extension does not affect reactor operations or accident analysis, and has no radiological consequences. Therefore, this proposed change will not involve an increase in the probability or consequences of any previously evaluated accident.

2. The proposed change will not create the possibility of any new accident not previously evaluated.

The proposed change does not affect normal plant operations or configuration, nor does it affect leak rate test methods. The test history at Catawba (no ILRT [integrated leak rate test] failures) provides continued assurance of the leak tightness of the containment structure.

3. There is no significant reduction in a margin of safety.

It has been documented in draft NUREG–1493 that an increase in the ILRT interval from 1 test every 3 years to 1 test every 10 years would result in a population exposure risk in the vicinity of 5 representative plants from .02% to .14%. The proposed change included herein, an increase from 40 (plus or minus) 10 months to 60 (plus or minus) 10 months, represents a small fraction of that already very small increase in risk. Therefore, it may be concluded that no significant reduction in a margin of safety will occur.

Based on the above, no significant hazards consideration is created by the proposed change.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The

Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By March 8, 1995, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the York County Library, 138 East Black Street, Rock Hill, South Carolina. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularly the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western union at 1–(800) 248–5100 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Herbert N. Berkow: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Albert Carr, Duke Power Company, 422 South Church Street, Charlotte, North Carolina, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated October 18, 1994, which is available for public inspection at the Commission's Public Document Room, the Gelman Buidling, 2120 L Street NW., Washington, DC, and at the local public document room located at the York County Library, 138 East Black Street, Rock Hill, South Carolina.

Dated at Rockville, Maryland, this 1st day of February 1995.

For the Nuclear Regulatory Commission.

Robert E. Martin,

Project Manager, Project Directorate II–3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 95–2801 Filed 2–3–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 40–3453]

Receipt of Application From Atlas Corp.

AGENCY: Nuclear Regulatory Commission.

ACTION: Receipt of Application From Atlas Corporation to Amend Condition 55 of Source Material License No. SUA–917.

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has received, by letter dated January 24, 1995, an application from Atlas Corporation (Atlas) to amend Condition 55 of Source Material License No. SUA–917.

The license amendment application proposes to modify License Condition 55 to change the completion date for placement of the interim cover on the tailings impoundment from February 15, 1995, to October 31, 1995.

FOR FURTHER INFORMATION CONTACT: Allan T. Mullins, High-Level Waste and Uranium Recovery Projects Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301–415–6693.

Atlas Corporation's application to amend Condition 55 of Source Material License SUA–917, which describes the proposed changes to the license condition and the reason for the request, is being made available for public inspection at the Commission's Public Document Room at 2120 L Street, NW (Lower Level), Washington, DC 20555.

The licensee and any person whose interest may be affected by the issuance of this license amendment may file a request for hearing. A request for hearing must be filed with the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, within 30 days of the publication of this notice in the **Federal Register**; be served on the NRC staff (Executive Director for Operations, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852); be served on the licensee (Atlas Corporation, Republic Plaza, 370 Seventeenth Street, Suite 3150, Denver, Colorado 80202); and must comply with the requirements set forth in the Commission's regulations, 10 CFR 2.105 and 2.714. The request for hearing must set forth with particularity the interest of the petitioner in the proceedings and how that interest may be affected by the results of the proceedings, including the reasons why the request should be granted, with particular reference to the following factors:

1. The nature of the petitioner's right under the Atomic Energy Act of 1954, as amended, to be made a party to the proceedings;
2. The nature and extent of the petitioner's property, financial, or other interest in the proceeding; and
3. The possible effect on the petitioner's interest of any order which may be entered in the proceedings.

The request must also set forth the specific aspects of the subject matter of the proceeding as to which petitioner wishes a hearing.

Atlas Corporation: Receipt of Application from Atlas Corporation to Amend Condition 55 of Source Material License No. SUA–917.

Signed at Rockville, Maryland, this 27th day of January 1995.

For the Nuclear Regulatory Commission.

John O. Thoma,

Acting Chief, High-Level Waste and Uranium Recovery Projects Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 94–2800 Filed 2–3–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–443]

North Atlantic Energy Service Corporation, et al; Notice of Partial Denial of Amendment to Facility Operating License and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) has denied partially a request by North Atlantic Energy Service Corporation (licensee), for an amendment to Facility Operating License No. 50–443 issued to the licensee for operation of the Seabrook Station, Unit No. 1, located in Rockingham County, New Hampshire. Notice of Consideration of Issuance of this amendment was published in the **Federal Register** on May 25, 1994 (59 FR 27057).

The purpose of the licensee's amendment request was to revise the Technical Specifications (TS) to make editorial changes and to revise certain administrative controls, and to delete the requirement for periodic review of certain procedures.

The NRC staff has concluded that the licensee's request to delete the periodic review of the specified procedures cannot be granted. The licensee was notified of the Commission's denial of the proposed change by a letter dated January 26, 1995.

By March 8, 1995, the licensee may demand a hearing with respect to the denial described above. Any person whose interest may be affected by this proceeding may file a written petition for leave to intervene.

A request for hearing or petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, by the above date.

A copy of any petitions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Thomas Dignan, Esquire, Ropes & Gray, One International Place, Boston, MA 02110–2624, attorney for the licensee.

For further details with respect to this action, see (1) the application for amendment dated January 14, 1994, and letter dated October 17, 1994, and (2) the Commission's letter to the licensee dated January 26, 1995.

These documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Exeter Public Library, 47 Front Street, Exeter, NH 03833.

Dated at Rockville, Maryland, this 26th day of January 1995.

For the Nuclear Regulatory Commission.

Phillip F. McKee,

Director, Project Directorate I–4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 95–2799 Filed 2–3–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–482]

In the Matter of Wolf Creek Nuclear Operating Corporation Wolf Creek Generating Station, Unit 1

Exemption

I

On June 4, 1985, the Commission issued Facility Operating License No. NPF–42 to Wolf Creek Nuclear Operating Corporation (the licensee) for the Wolf Creek Generating Station, Unit 1 (WCGS). The license provides, among other things, that the licensee is subject

to all rules, regulations, and orders of the Commission now or hereafter in effect.

II

It is stated in 10 CFR 73.55, ''Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage,'' paragraph (a), that ''The licensee shall establish and maintain an onsite physical protection system and security organization which will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety.''

It is specified in 10 CFR 73.55(d), ''Access Requirements,'' paragraph (1), that ''The licensee shall control all points of personnel and vehicle access into a protected area.'' It is specified in 10 CFR 73.55(d)(5) that ''A numbered picture badge identification system shall be used for all individuals who are authorized access to protected areas without escort. . . . '' It also states that an individual not employed by the licensee (i.e., contractors) may be authorized access to protected areas without escort provided the individual ''receives a picture badge upon entrance into the protected area which must be returned upon exit from the protected area. . . . ''

The licensee proposed to implement an alternative unescorted access control system which would eliminate the need to issue and retrieve badges at each entrance/exit location and would allow all individuals with unescorted access to keep their badges with them when departing the site.

An exemption from 10 CFR 73.55(d)(5) is required to allow contractors who have unescorted access to take their badges offsite instead of returning them when exiting the site. By letter dated November 23, 1994, the licensee requested an exemption from certain requirements of 10 CFR 73.55(d)(5) for this purpose.

III

Pursuant to 10 CFR 73.5, ''Specific exemptions,'' The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions in this part as it determines are authorized by law and will not endanger life or property or the common defense and security, and are otherwise in the public interest. Pursuant to 10 CFR 73.55, the Commission may authorize a licensee to provide measures for protection against radiological sabotage provided the licensee demonstrates that the measures have ''the same high assurance objective'' and meet ''the general performance requirements'' of the regulation, and ''the overall level of system performance provides protection against radiological sabotage equivalent'' to that which would be provided by the regulation.

At the WCGS site, unescorted access into protected areas is controlled through the use of a photograph on a combination badge and keycard. (Hereafter, these are referred to as badges.) The security officers at the entrance station use the photograph on the badge to visually identify the individual requesting access. The badges for both licensee employees and contractor personnel who have been granted unescorted access are issued upon entrance at the entrance/exit location and are returned upon exit. The badges are stored and are retrievable at the entrance/exit location. In accordance with 10 CFR 73.55(d)(5), contractor individuals are not allowed to take badges offsite. In accordance with the plant's physical security plan, neither licensee employee nor contractors are allowed to take badges offsite.

Under the proposed system, each individual who is authorized for unescorted access into protected areas would have the physical characteristics of their hand (hand geometry) registered with their badge number in the access control system. When an individual enters the badge into the card reader and places the hand on the measuring surface, the system would record the individual's hand image. The unique characteristics of the extracted hand image would be compared with the previously stored template in the access control system to verify authorization for entry. Individuals, including licensee employees and contractors, would be allowed to keep their badges with them when they depart the site and thus eliminate the process to issue, retrieve and store badges at the entrance stations to the plant. Badges do not carry any information other than a unique identification number.

All other access processes, including search function capability, would remain the same. This system would not be used for persons requiring escorted access, i.e., visitors.

Based on a Sandia report entitled, ''A Performance Evaluation of Biometric Identification Devices'' (SAND91–0276 UC–906 Unlimited Release, printed June 1991), and on the licensee's experience with the current photo-identification system, the licensee stated that the false acceptance rate for the hand geometry system is comparable to that of the current system. The biometric system has been in use for a number of years at several sensitive Department of Energy facilities. The licensee will implement a process for testing the proposed system to ensure continued overall level of performance equivalent to that specified in the regulation. The Physical Security Plan for WCGS will be revised to include implementation and testing of the hand geometry access control system and to allow licensee employees and contractors to take their badges offsite.

The licensee will control all points of personnel access into a protected area under the observation of security personnel through the use of a badge and verification of hand geometry. A numbered picture badge identification system will continue to be used for all individuals who are authorized unescorted access to protected areas. Badges will continue to be displayed by all individuals while inside the protected area.

Since both the badges and hand geometry would be necessary for access into the protected areas, the proposed system would provide for a positive verification process and the potential loss of a badge by an individual, as a result of taking the badge offsite, would not enable an unauthorized entry into protected areas.

For the foregoing reasons, pursuant to 10 CFR 73.55, the NRC staff has determined that the proposed alternative measures for protection against radiological sabotage meet ''the same high assurance objective,'' and ''the general performance requirements'' of the regulation and that ''the overall level of system performance provides protection against radiological sabotage equivalent'' to that which would be provided by the regulation.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 73.5, this exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants Wolf Creek Nuclear Operating Corporation an exemption from those requirements of 10 CFR 73.55(d)(5) relating to the returning of picture badges upon exit from the protected area such that individuals not employed by the licensee, i.e., contractors, who are authorized unescorted access into the protected area, may take their picture badges offsite.

Pursuant to 10 CFR 51.32, the Commission has determined that the

granting of this exemption will have no significant impact on the environment (60 FR 4929).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 30th day of January 1995.

For the Nuclear Regulatory Commission.

Jack W. Roe,

Director, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 95–2798 Filed 2–3–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–424 and 50–425]

Georgia Power Company, et al.; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF–68 and NPF–81 issued to Georgia Power Company, et al. (the licensee) for operation of the Vogtle Electric Generating Plant, Units 1 and 2, located in Burke County, Georgia.

The proposed amendments would revise Technical Specification 6.4.1.2 to provide a more accurate description of the Plant Review Board (PRB) composition. Specifically, the proposed changes would (1) indicate the plant organization functional areas to be represented on the PRB rather than the departments, (2) combine the Technical Support Department with the Engineering Support Department, and (3) specify a minimum size for the PRB composition in support of the proposed changes.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed changes to the Technical Specifications do not involve a significant increase in the probability or consequences of an accident previously evaluated because the composition of the Plant Review Board (PRB) does not directly affect any material condition of the plant that could directly contribute to causing or mitigating the effects of an accident. Additionally, the changes to the PRB composition will not diminish its ability to review plant activities, therefore, these changes will not diminish the PRB's role in reviewing changes that could affect the probability or consequences of accidents.

2. The proposed changes to the Technical Specifications do not create the possibility of a new or different kind of accident from any accident previously evaluated because the changes are administrative in nature to support organizational changes that are needed to enhance the operation of the plant. Since no physical change is being made to the plant or its operating parameters, the proposed changes do not introduce the possibility of a new or different type of accident.

3. The proposed changes to the Technical Specifications do not involve a significant reduction in a margin of safety because the responsibilities, quorum, meeting frequency and functions of the PRB remain unchanged. The qualifications of the PRB members are not being reduced, therefore, the current level of safety contributed by the PRB function will not be diminished by the proposed Technical Specification changes.

Based upon the preceding information, it has been determined that the proposed Technical Specification changes do not involve a significant hazards consideration as defined by 10 CFR 50.92.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By March 8, 1995, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and

how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 248–5100 (In Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Herbert N. Berkow: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Arthur H. Domby, Troutman Sanders, NationsBank Plaza, Suite 5200, 600 Peachtree Street, NE., Atlanta, Georgia, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendments dated January 20, 1995, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC, and at the local public document room located at the Burke County Public Library, 412 Fourth Street Waynesboro, Georgia.

Dated at Rockville, Maryland, this 1st day of February 1995.

For the Nuclear Regulatory Commission.

Louis L. Wheeler,

Senior Project Manager, Project Directorate II–3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 95–2796 Filed 2–3–95; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 40–8968]

Hydro Resources, Inc.

AGENCY: Nulear Regulatory Commission.

ACTION: Notice of public meetings.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC), in cooperation with the U.S. Bureau of Land Management (BLM) and U.S. Bureau of Indian Affairs (BIA), will conduct three public meetings for the purpose of receiving comments on the recently published Draft Environmental Impact Statement (DEIS) regarding the proposed construction and operation of an in-situ leach (ISL) project in McKinley County, New Mexico. This DEIS describes and evaluates the potential environmental impacts of granting Hydro Resources, Inc. a combined source and byproduct material license and minerals operating leases for Federal and Indian lands for the ISL project. Comments received on the DEIS will be addressed in the Final Environmental Impact Statement, to be published at a future date.

Two public meetings will be held on February 22, 1995, at the Crownpoint Chapter House, Crownpoint, New Mexico from 10 a.m. to 12 noon and from 6 p.m. to 8 p.m. One public meeting will be held on February 23, 1995, at the Church Rock Chapter House, Church Rock, New Mexico from 6 p.m. to 8 p.m.

DATES: Public meetings for the purpose of receiving comments on the DEIS will be held on February 22, 1995 at the Crownpoint Chapter House, Crownpoint, New Mexico from 10 a.m. to 12 noon and from 6 p.m. to 8 p.m., and on February 23, 1995 at the Church Rock Chapter House, Church Rock, New Mexico from 6 p.m. to 8 p.m. Written comments on the DEIS should be received on or before February 28, 1995, at the address listed below.

ADDRESSES: A free single copy of this DEIS (NUREG-1508 may be requested by those considering public comment by writing to the NRC Publications Section, ATTN: Superintendent of Documents, U.S. Government Office, P.O. Box

37082, Washington, DC 20013–7082. A copy is also available for inspection and/or copying in the NRC Public Document Room, 2120 L St. NW, Washington, DC.

Any interested party may submit comments on this document for consideration by the staff. To be certain of consideration, comments on this report must be received by February 28, 1995. Comments received after the due date will be considered to the extent practical. Comments on the DEIS should be sent to Chief, High-Level Waste and Uranium Recovery Projects Branch, Mail Stop TWFN 7–J9, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

FOR FURTHER INFORMATION CONTACT: Mr. Michael C. Layton, High-Level Waste and Uranium Recovery Projects Branch, Mail Stop TWFN 7–J9, Division of Waste Management, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone 301/415–6676.

SUPPLEMENTARY INFORMATION: The NRC, in cooperation with the BLM and the BIA, has prepared a DEIS regarding the administrative action of authorizing Hydro Resources, Inc. (HRI), to conduct in-situ leach uranium mining, also known as solution mining, in compliance with a combined source and byproduct material license issued by the NRC, and minerals operating leases issued for Federal and Indian lands by the BLM and BIA. The license and leases would provide programmatic and regulatory oversight in administrative matters; impose operating restrictions and license conditions, as appropriate; and specify environmental monitoring, recordkeeping, and reporting requirements. The DEIS describes the evaluation by the interagency review group concerning (1) the purpose of and need for the proposed action, evaluated under NEPA and the agencies' implementing regulations, (2) alternatives considered, (3) existing environmental conditions, and (4) environmental consequences of the proposed action and proposed mitigating measures. This DEIS concludes, after weighing the environmental, and other benefits of the proposed project against the environmental and other costs, that the appropriate action is to issue the requested license and leases authorizing the applicant to proceed with the project as discussed in this DEIS.

A Notice of Availability and Notice of Opportunity for Hearing were published previously (59 FR 56557, November 14, 1994). The notice offered members of the public an opportunity to comment upon the DEIS and to request an adjudicatory hearing on the licensing application. The closing date for requesting an Opportunity for Hearing on the pending licensing action expired on December 14, 1994; the date for submitting public comments on the DEIS originally expired on January 7, 1995. Several requests were received by the NRC to extend the 60-day public comment period. The NRC acceded to these requests and extended the comment period from January 7, 1995 to February 28, 1995.

The purpose of this notice is to inform the public that three public meetings will be held at the Chapter Houses in Crownpoint and Church Rock, New Mexico for the purpose of receiving comments on this DEIS. Written comments must be received by February 28, 1995. Comments received after this date will be considered to the extent practical. Any interested party may submit comments on this document for consideration by the staff.

Dated at Rockville, Maryland, this 30th day of January 1995.

For the Nuclear Regulatory Commission

John O. Thoma,

Acting Chief, High-Level Waste and Uranium, Recovery Projects Branch, Division of Waste Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 94–2797 Filed 2–3–95; 8:45 am]

BILLING CODE 7590–01–M

PHYSICIAN PAYMENT REVIEW COMMISSION

Commission Meeting

AGENCY: Physician Payment Review Commission.

ACTION: Notice of meeting.

SUMMARY: The Commission will hold meetings on Thursday, February 23 and Friday, February 24, 1995 at the Washington Marriott hotel, 1221 22nd Street NW., Washington, DC, in the Dupont Room to review and revise the draft of its Annual Report to Congress due March 31, 1995. The meeting is scheduled to begin at 10 a.m. on Thursday and 9 a.m. on Friday and the discussion will follow the chapter outline of the report:

I. Medicare and Medicaid
1. Background and Overview
2. Access for Medicare Beneficiaries
3. Physician Payment Under the Medicare Fee Schedule
4. Volume Performance Standards
5. Medicare and Other Payers
6. Medicare Risk Program Payment Policy
7. Medicare Coverage Decisions
8. Telemedicine
9. Medicaid Demonstration Waivers

II. Broader Health Care System Issues
10. Background and Overview
11. Insurance Reform in a Voluntary Market
12. Relationships between Health Plans and Providers
13. Provider-Driven Integration
14. Network Development in Rural Areas
15. Physician Networks and Antitrust
16. The Changing Labor Market for Physicians
17. Medical Liability Reform
18. Monitoring Quality and Performance
19. Development and Use of Practice Guidelines

Appendix

A. Use of Medicare Relative Value Scale by other Payers

While an attempt will be made to keep to this outline, topics may be taken out of sequence. If there is one particular topic of interest, please call to confirm the agenda the week prior to the meeting. After the Commission has reviewed the major conclusions and recommendations for the annual report, it will adjourn into Executive Session for editorial review of the report chapters.

Addresses: Please note that the Commission has a new address: 2120 L Street, NW./Suite 200/Washington, DC 20037. The telephone number is the same: 202/653–7220.

For Further Information Contact: Annette Hennessey, Executive Assistant, at 202/653–7220.

Supplementary Information: Because of the meeting's format, no agenda will be issued. You may confirm the meeting time and order of issues by calling the Commission's office at 202–653–7220.

Lauren B. LeRoy,

Acting Executive Director.

[FR Doc. 95–2770 Filed 2–3–95; 8:45 am]

BILLING CODE 6820–SE–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–20869; 812–9348]

ABT Growth and Income Trust, et al.; Notice of Application

January 30, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (''Act'').

APPLICANTS: ABT Growth and Income Trust, ABT Utility Income Fund, Inc., ABT Investment Series, Inc., ABT Southern Master Trust (together, the ''Companies''), ABT Financial Services, Inc. (''ABTFS''), and Palm Beach Capital Management, Ltd. (''PBCM'').

RELEVANT ACT SECTIONS: Conditional order requested under section 6(c) of the Act granting an exemption from sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c), and 22(d) thereof and rule 22c–1 thereunder.

SUMMARY OF APPLICATION: Applicants seek a conditional order permitting the Companies to issue multiple classes of shares representing interests in the same portfolio of securities, and to assess and, under certain circumstances, waive a contingent deferred sales charge (''CDSC'') on certain share redemptions. Applicants request that any relief granted pursuant to the application also apply to future investment companies (a) for which PBCM or any person controlling, controlled by, or under common control with PBCM serves as investment adviser, and/or ABTFS or any person controlling, controlled by, or under common control with ABTFS serves as principal underwriter, and (b) that issue and sell classes of shares on a basis identical in all material respects to that described in the application.

FILING DATE: The application was filed on December 8, 1994. Counsel for Applicants has undertaken to file an amendment during the notice period, the substance of which is incorporated herein.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 24, 1995, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reasons for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549. Applicants, 340 Royal Palm Way, Palm Beach, Florida 33480.

FOR FURTHER INFORMATION CONTACT: H.R. Hallock, Jr. Special Counsel, at (202) 942–0564 or Barry D. Miller, Senior Special Counsel at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. Each of the Companies is an open-end diversified management investment company registered under the Act. ABT Southern Master Trust offers three portfolios. The other three Companies each offer one portfolio. (The six portfolios, together with any future investment companies that rely on the requested order, are referred to below as the ''Funds''.)

2. PBCM, or a person controlling, controlled by, or under common control with PBCM, will be the investment adviser for each Fund. ABTFS, or a person controlling, controlled by, or under common control with ABTFS, will serve as the distributor of the shares of each Fund (the ''Distributor''). Shares of the Funds will be available through the Distributor and through financial intermediaries that have entered into agreement with the Distributor to sell shares.

A. The Multiple Class System

1. Applicants propose that each Fund be permitted to create an unlimited number of classes (the ''Multiple Class System''), which would allow each Fund to offer investors the option of purchasing shares (a) in connection with a plan or plans adopted pursuant to rule 12b–1 under the Act (a ''Distribution Plan''); (b) in connection with a non-rule 12b–1 shareholder services plan or plans (a ''Shareholder Services Plan''), (c) in connection with the allocation of certain expenses that are directly attributable only to a particular class; (d) without any Distribution Plan or Shareholder Services Plan (collectively, the ''Plans''); (e) subject to varying front-end sales charges; (f) subject to varying CDSCs; and/or (g) subject to certain conversion features.

2. With respect to each class, each Fund could enter into one or more Distribution Plan agreements and/or Shareholder Services Plan agreements (collectively, ''Plan Agreements'') with PBCM, the Distributor, and/or other groups, organizations or institutions concerning the provision of certain services to shareholders of that class. With respect to each class, a Fund could pay either directly or indirectly for such services under a Plan Agreement (''Plan Payments''). The expense of Plan Payments would be borne entirely by the owners or beneficial owners of the class of the Fund to which the Plan Agreement relates.

3. The provision of distribution services and shareholder servicing under the Plans will complement (and not be duplicative of) the services to be provided to each Fund by its manager, investment adviser(s), and/or distributor, and by the parties that provide custody, transfer agency, and administrative services to each Fund. When a class is subject to both a Distribution Plan and a Shareholder Services Plan, the provision of services under one Plan will complement (and not be duplicative of) the services provided under the other Plan. The Funds will comply with Article III, Section 26 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc. (''NASD'') with respect to asset-based distribution charges.

4. The expenses of the Companies that cannot be attributed directly to any one Fund (''Company Expenses'') generally will be allocated to each Fund based on the relative net assets of the Fund. Certain expenses that may be attributable to a particular Fund, but not a particular class (''Fund Expenses''), will be allocated to each class based upon the relative net assets of the classes. Certain expenses may be attributable to a particular class of a Fund (''Class Expenses''). All such Class Expenses incurred by a class will be charged directly to the net assets of that particular class, and thus will be borne on a *pro rata* basis by the outstanding shares of such class.

5. PBCM may choose to reimburse or waive Class Expenses on certain classes of a Fund on a voluntary, temporary basis. Class Expenses are by their nature specific to a given class and, therefore, expected to vary from one class to another. Applicants thus believe that it is acceptable and consistent with shareholder expectations to reimburse or waive Class Expenses at different levels for different classes of the same Fund.

6. In addition, PBCM may waive or reimburse, Company Expenses and/or Fund Expenses (with or without a waiver or reimbursement of Class Expenses), but only if the same proportionate amount of Company Expenses and/or Fund Expenses are waived or reimbursed for each class of the Fund. Thus, any Company Expenses that are waived or reimbursed would be credited to each class of a Fund based on the relative net assets of the classes. Similarly, any Fund Expenses that are waived or reimbursed would be credited to each class of that Fund according to the relative net assets of the classes.

7. Because Plan Payments and other Class Expenses will be borne exclusively by the class to which they are attributable, the net income and net asset value per share of (and dividends payable to) each class within a Fund may be different. Dividends and other

distributions payable to each class of shares in a Fund, however, will be declared and paid on the same days and at the same times, and, except with respect to Plan Payments and Class Expenses, will be determined in the same manner and paid in the same amounts.

8. Shares of one or more classes subject to a CDSC (''Convertible CDSC Shares'') may automatically convert to shares of a class not subject to a CDSC (''Non-CDSC Shares'') after a prescribed period of time, and thereafter be subject to lower Plan Payments, if any, applicable to the Non-CDSC Shares. It is expected that Convertible CDSC Shares will convert to Non-CDSC Shares after approximately eight years from the purchase date. Non-CDSC Shares will in all cases be subject to lower aggregate Plan Payments, if any, and any other ongoing Class Expenses than Convertible CDSC Shares.

9. The conversion will be on the basis of the relative net asset values of the two classes, without the imposition of any sales or other charge except that any asset-based sales or other charge applicable to the Non-CDSC Shares would thereafter be applied to the converted shares. Convertible CDSC Shares in a shareholder's account that were purchased through the reinvestment of dividends and other distributions paid in respect of Convertible CDSC Shares will be considered to be held in a separate sub-account. Each time any Convertible CDSC Shares in the shareholder's account convert to Non-CDSC Shares, a *pro rata* portion of the Convertible CDSC Shares then in the sub-account will also convert to Non-CDSC Shares.

10. The conversion of Convertible CDSC Shares into Non-CDSC Shares would be subject to the availability of an opinion by counsel or an Internal Revenue Service private letter ruling to the effect that the conversion does not constitute a taxable event under federal income tax law. The proposed conversion may be suspended if such a ruling or opinion is not available. In that event, no further conversions would occur and the Convertible CDSC Shares might be subject to higher Plan Payments for an indefinite period.

11. Different classes within a Fund will have different exchange privileges. Shares may be exchanged at net asset value for shares of the corresponding class of certain other Funds. Exchange privileges will comply with rule 11a–3 under the Act.

B. The CDSC

1. Applicants request that the Funds be permitted to assess a CDSC on share redemptions of certain classes, if such shares are redeemed within a prescribed period of time after purchase.

In no event would the amount of the CDSC exceed 6% of the aggregate purchase payments made by an investor in a CDSC class. The CDSC of any particular Fund, however, may be lower than 6%. The amount of the CDSC to be imposed in any given instance will depend on the number of years elapsed since the investor purchased the shares being redeemed, as set forth in the Fund's prospectus. The amount of the CDSC will be calculated as the lesser of the amount that represents a specified percentage of the net asset value of the shares at the time of purchase, or the amount that represents such percentage of the net asset value of the shares at the time of redemption. The CDSC will comply, to the extent applicable, with the requirements of Article III, Section 26(d) of the Rules of Fair Practice of the NASD.

2. The CDSC will not be imposed on redemptions of shares that were purchased more than six years prior to the redemptions (the ''CDSC Period''), or on shares derived from reinvestment of dividends or distributions. No CDSC will be imposed on an amount that represents an increase in the value of the shares redeemed resulting from capital appreciation above the amount paid for such shares purchased during the CDSC Period. In determining the applicability and rate of any CDSC, it will be assumed that a redemption is made first on shares representing reinvestment of dividends and capital gain distributions, then of shares held by the shareholder for a period equal to or greater than the CDSC Period, and finally of other shares held by the shareholder for the longest period of time. This will result in a charge, if any, imposed at the lowest possible rate. No CDSC will be imposed on any shares issued prior to the date of the order granting exemptive relief.

3. Applicants request the ability to waive or reduce the CDSC in certain instances as described in the application. If a Fund waives or reduces the CDSC, such waiver or reduction will be uniformly applied to all offerees of the particular class of the Fund's shares. In waiving or reducing the CDSC, the Funds will comply with the requirements of rule 22d–1 under the Act. The CDSC will be waived or reduced as provided in a Fund's prospectus at the time the investor purchased the shares.

4. Applicants also request the ability to provide a *pro rata* credit for any CDSC paid in connection with a redemption followed by a reinvestment effected within a specified period not exceeding 365 days from the redemption. Such credit will be paid by the Distributor.

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 18(f)(1), 18(g), and 18(i) to the extent that the proposed Multiple Class System may be deemed to (a) result in a ''senior security'' within the meaning of section 18(g) and to be prohibited by section 18(f)(1); and (b) violate the equal voting provisions of section 18(i). Applicants also request an order pursuant to section 6(c) providing an exemption from sections 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act and rule 22c–1 thereunder, to the extent necessary to permit the imposition of a CDSC on certain redemptions of shares, and the waiver or reduction of the CDSC in certain circumstances.

2. Applicants believe that the proposed allocation of expenses and voting rights in the manner described in the application is equitable and would not discriminate against any group of shareholders. Although investors purchasing shares offered in connection with a Plan and/or bearing particular Class Expenses would bear the costs associated with the related services, they would also enjoy the benefits of those services and the exclusive shareholder voting rights with respect to matters affecting the applicable Plan. Conversely, investors purchasing shares that are not covered by a Plan or not bearing Class Expenses would not be burdened with such expenses or enjoy such voting rights.

3. Applicants assert that the abuses that section 18 of the Act is intended to redress are not present under the proposed arrangement. In this regard, Applicants state that because the rights and privileges of classes with respect to any Fund would be substantially identical, the possibility that their interests would ever conflict is remote. In addition, the proposed arrangement does not involve borrowings and does not affect the Funds' assets or reserves. Nor will the proposed arrangement increase the speculative character of the shares in a Fund, because all shares will participate in all of the Fund's appreciation, income, and expenses. No class of shares will have any preference or priority over any other class in a Fund in the usual sense (that is, no class will have distribution or liquidation preferences with respect to particular assets and no class will be protected by any reserve or other account).

Applicants' Conditions

Applicants agree that the following conditions may be imposed in any order granting the requested relief:

1. Each class of shares of a Fund will represent interests in the same portfolio of investments, and be identical in all respects, except as set forth below. The only differences between the classes of shares of a Fund will relate solely to one or more of the following: (a) Expenses assessed to a class pursuant to a Plan, if any, with respect to such class; (b) the impact of Class Expenses, which will be limited to any or all of the following: (i) Transfer agent fees identified as being attributable to a specific class of shares, (ii) stationery, printing, postage, and delivery expenses related to preparing and distributing materials such as shareholder reports, prospectuses, and proxy statements to current shareholders of a specific class, (iii) Blue Sky registration fees incurred by a class of shares, (iv) SEC registration fees incurred by a class of shares, (v) expenses of administrative personnel and services as required to support the shareholders of a specific class, (vi) directors/trustees' fees or expenses incurred as a result of issues relating to one class of shares, (vii) accounting expenses relating solely to one class of shares, (viii) auditors fees, litigation expenses, and legal fees and expenses relating to a class of shares, (ix) expenses incurred in connection with shareholders' meetings as a result of issues relating to one class of shares, and (x) any other incremental expenses subsequently identified which should be properly allocated to a particular class of shares and which, as such, are approved by the SEC pursuant to an amended order; (c) the fact that the classes will vote separately with respect to matters relating to a Fund's Distribution Plan, if any, or any other matters appropriately limited to such class(es), except as provided in condition 15 below; (d) the different exchange privileges of the classes of shares, if any; (e) the designation of each class of shares of a Fund; and (f) certain conversion features offered by some of the classes.

2. Each Company's board of directors/trustees (''Trustees''), including a majority of the Trustees who are not interested persons of the Company (''Independent Trustees''), will have approved the Multiple Class System with respect to a particular Fund prior to the implementation of the system by that Fund. The minutes of the meetings of the Trustees regarding the deliberations of the Trustees with respect to the approvals necessary to implement the Multiple Class System will reflect in detail the reasons for the determination by the Trustees that the proposed Multiple Class System is in the best interests of each Fund and its shareholders.

3. The initial determination of the Class Expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the Trustees, including a majority of the Independent Trustees. Any person authorized to direct the allocation and disposition of monies paid or payable by a Fund to meet Class Expenses shall provide to the Trustees, and the Trustees shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

4. If any class will be subject to a Shareholder Services Plan, the Plan will be adopted and operated in accordance with the procedures set forth in rule 12b–1(b) through (f) as if the expenditures made thereunder were subject to rule 12b–1, except that shareholders will not enjoy the voting rights specified in rule 12b–1.

5. On an ongoing basis, the Trustees, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor each Fund, as applicable, for the existence of any material conflicts among the interests of the classes of its shares, if there is more than one class. The Trustees, including a majority of the Independent Trustees, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. Each Fund's investment manager and/or Distributor will be responsible for reporting any potential or existing conflicts to the Trustees. If such a conflict arises, the Fund's investment manager and/or Distributor, at their own expense, will take such actions as are necessary to remedy such conflict, including establishing a new registered management investment company, if necessary.

6. The Trustees will receive quarterly and annual statements concerning the amounts expended under the Plans complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any fee for services charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the Trustees to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the Independent Trustees in the exercise of their fiduciary duties.

7. Dividends and other distributions paid by a Fund with respect to each class of its shares, to the extent any dividends and other distributions are paid, will be declared and paid on the same day and at the same time, and will be determined in the same manner and will be in the same amount, except that the amount of the dividends declared and paid by a particular class may be different from that of another class because Plan Payments made by a class under a Plan and other Class Expenses will be borne exclusively by that class.

8. The methodology and procedures for calculating the net asset value and dividends and other distributions of the classes and the proper allocation of expenses among the classes have been reviewed by an expert (the ''Expert'') who has rendered a report to the Applicants, which has been provided to the SEC, stating that such methodology and procedures are adequate to ensure that such calculations and allocations would be make in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, base upon such review, will render at least annually a report to the Funds that the calculations and allocations are being made properly. The reports of the Expert will be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Expert with respect to such reports, following request by the Funds which the Funds agree to make, will be available for inspection by the Commission staff upon written request to the Funds for such work papers by a senior member of the Division of Investment Management or of a Regional Office of the SEC, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate or Assistant Administrators. The initial report of the Expert is a report on the ''Design of a System,'' including policies and procedures related thereto to be placed into operation, as defined and described in Statement of Auditing Standards (''SAS'') No. 70 of the American Institute of Certified Public Accountants (''AICPA'') and the ongoing reports will be ''Reports on Policies and Procedures Placed in Operation and Tests of Operating Effectiveness'' as defined and described in SAS No. 70 of the AICPA, as it may be amended from time to time, or in similar auditing

standards as may be adopted by the AICPA from time to time.

9. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and other distributions of the classes of shares and the proper allocation of expenses among the classes of shares and this representation has been concurred with by the Expert in the initial report referred to in condition 8 above and will be concurred with by the Expert, or an appropriate substitute Expert, on an ongoing basis at least annually in the ongoing reports referred to in condition 8 above. Applicants will take immediate corrective action if the Expert or appropriate substitute Expert does not so concur in the ongoing reports.

10. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the Trustees with respect to the Multiple Class System will be set forth in guidelines that will be furnished to the Trustees.

11. Each of the Funds will disclose the respective expenses, performance data, distribution arrangements, services, fees, sales loads, deferred sales loads, conversion features, and exchange privileges applicable to each class of shares in every prospectus, regardless of whether all classes of shares are offered through such prospectus. Each Fund will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to the Fund as a whole generally and not on per class basis. Each Fund's per share data, however, will be prepared on a per class basis with respect to all classes of shares of such Fund. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will also disclose the expenses and/or performance data applicable to all classes of shares. The information provided by Applicants for publication in any newspaper or similar listing of the Funds' net asset values and public offering prices will present each class of shares separately.

12. The prospectus of each Fund will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling or servicing Fund shares may receive different levels of compensation with respect to one particular class of shares over another in the Fund.

13. Applicants acknowledge that the grant of the exemptive order requested by the application will not imply SEC approval of, authorization of, or acquiescence in any particular level of payments that any Fund may make pursuant to a Plan in reliance on the exemptive order.

14. Any class of shares with a conversion feature will convert into another class of shares on the basis of the relative net asset values of the two classes, without the imposition of any sales load, fee, or other charge. After conversion, the converted shares will be subject to an asset-based sales charge and/or service fee (as those terms are defined in Article III, Section 26 of the NASD's Rules of Fair Practice), if any, that in the aggregate are lower than the asset-based sales charges and service fee to which they were subject prior to the conversion.

15. If a Fund implements any amendment to a Distribution Plan (or, if presented to shareholders, adopts or implements any amendment of a Shareholder Services Plan) that would increase materially the amount that may be borne by the Non-CDSC Shares under the Plan, then existing CDSC Shares will stop converting into the Non-CDSC Shares unless the holders of a majority of convertible CDSC Shares, as defined in the Act, voting separately as a class, approve the amendment. The Trustees shall take such action as is necessary to ensure that existing Convertible CDSC Shares are exchanged or converted into a new class of shares (''New Non-CDSC Shares''), identical in all material respects to Non-CDSC Shares as they existed prior to implementation of the amendment, no later than the date such shares previously were scheduled to convert into Non-CDSC Shares. If deemed advisable by the Trustees to implement the foregoing, such action may include the exchange of all existing Convertible CDSC Shares for a new class (''New Convertible CDSC Shares'') of shares, identical to existing Convertible CDSC Shares in all material respects except that the New Convertible CDSC Shares will convert into the New Non-CDSC Shares. The New Non-CDSC Shares and New Convertible CDSC Shares may be formed without further exemptive relief. Exchanges or conversions described in this condition shall be effected in a manner that the Trustees reasonably believe will not be subject to Federal taxation. In accordance with condition 5, any additional cost associated with the creation, exchange, or conversion of the New Non-CDSC Shares or New Convertible CDSC Shares shall be borne solely by the Fund's investment manager or Distributor. Convertible CDSC Shares sold after the implementation of the amendment may convert into Non-CDSC Shares subject to the higher maximum payment, provided that the material features of the Non-CDSC Shares plan and the relationship of such plan to the Convertible CDSC Shares are disclosed in an effective registration statement.

16. The Distributor will adopt compliance standards as to when each class of shares may be sold to particular investors. Applicants will require all persons selling shares of a Fund to agree to conform to such standards.

17. Applicants will comply with the provisions of proposed rule 6c–10 under the Act, Investment Company Act Release No. 16169 (Nov. 2, 1988), as such rule is currently proposed and as it may be reproposed, adopted or amended.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2752 Filed 2–3–95; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–20868; 812–9312]

Franklin Gold Fund, et al.; Notice of Application

January 30, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: Franklin Gold Fund; Franklin Premier Return Fund; Franklin Equity Fund; AGE High Income Fund, Inc.; Franklin Custodian Funds, Inc.; Franklin Money Fund; Franklin California Tax-Free Income Fund, Inc.; Franklin Federal Money Fund; Franklin Tax-Exempt Money Fund; Franklin New York Tax-Free Income Fund, Inc.; Franklin Federal Tax-Free Income Fund; Franklin Tax-Free Trust; Franklin California Tax-Free Trust; Franklin New York Tax-Free Trust; Franklin Investors Securities Trust; Institutional Fiduciary Trust; Franklin Balance Sheet Investment Fund; Franklin Tax-Advantaged International Bond Fund; Franklin Tax-Advantaged High Yield Securities Fund; Franklin Tax-Advantaged U.S. Government Securities Fund; Franklin Strategic Mortgage Portfolio; Franklin Municipal Securities Trust; Franklin Managed Trust; Franklin Strategic Series; Adjustable Rate Securities Portfolios; The Money Market

Portfolios; Midcap Growth Portfolio; The Portfolios Trust; Franklin International Trust; Franklin Real Estate Securities Trust; Franklin Valuemark Funds; Franklin Government Securities Trust; Franklin/Templeton Global Trust (collectively, the ''Franklin Funds''); Templeton Growth Fund, Inc.; Templeton Funds, Inc.; Templeton Smaller Companies Growth Fund, Inc.; Templeton Income Trust; Templeton Real Estate Securities Fund; Templeton Global Investment Trust; Templeton Global Opportunities Trust; Templeton American Trust, Inc.; Templeton Institutional Funds, Inc.; Templeton Developing Markets Trust (collectively, the ''Templeton Funds''); Franklin Advisers, Inc.; Franklin Institutional Services Corporation; Templeton, Galbraith & Hansberger Ltd.; Templeton Investment Counsel, Inc.; Templeton Investment Management (Hong Kong) Limited; Templeton Investment Management (Singapore) Pte. Ltd. (collectively, the ''Advisers''); and Franklin/Templeton Distributors, Inc. (the ''Distributor'').

RELEVANT ACT SECTIONS: Order requested under section 6(c) of the Act for an exemption from sections 2(a)(32), 2(a)(35), 18(f)(1), 18(g), 18(i), 22(c), and 22(d) of the Act and rule 22c–1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order that would permit certain investment companies to issue multiple classes of securities representing interests in the same portfolio and assess and, under certain circumstances, waive a contingent deferred sales charge (''CDSC'') on certain redemptions of shares. The order would supersede an existing CDSC order (the ''Existing CDSC Order'').[1]

FILING DATES: The application was filed on November 2, 1994, and amended on January 23, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 24, 1995, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, N.W., Washington D.C. 20549. Applicants, 777 Mariners Island Boulevard, San Mateo, California 94404.

FOR FURTHER INFORMATION CONTACT:

Deepak T. Pai, Staff Attorney, at (202) 942–0574, or Robert A. Robertson, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. Each of the Franklin Funds and the Templeton Funds is an open-end management investment company organized at either a (a) Delaware business trust; (b) Maryland corporation; (c) California corporation; (d) Massachusetts business trust; (e) Colorado corporation; (f) California limited partnership; or (g) New York Corporation. Franklin Advisers, Inc. and Franklin Institutional Services Corp. are California corporations. Templeton, Galbraith Hansberger Ltd. is a Bahamas corporation, Templeton Investment Counsel, Inc. is a Florida corporation, Templeton Investment Management (Hong Kong) Limited is a Hong Kong corporation and Templeton Investment Management (Singapore) Pte. Ltd. is a Singapore corporation. The Advisers provide investment advisory services to the Funds. The Distributor is a New York corporation and acts as principle underwriter of the Funds' shares. The Advisers and the Distributor are each directly or indirectly wholly-owned subsidiaries of Franklin Resources, Inc., a publicly-owned company whose shares are listed on the New York Stock Exchange. Applicants are currently parties to the Existing CDSC Order, which permits the assessment of a CDSC in certain circumstances. Applicants request relief for any future open-end investment companies for which the Advisers, or any entities controlling, controlled by or under common control with the Advisers, acts as investment advisers or for which the Distributor, or any entities controlling, controlled by or under common control with the Distributor, acts as principal underwriter (the Franklin Funds, the Templeton Funds and such future funds are collectively referred to herein as the ''Funds'').

A. Multiple Class Distribution System

1. Applicants propose to establish a multiple class distribution system that would enable each Fund to issue and sell multiple classes of shares of beneficial interest with different combinations of front-end sales charges, distribution fees, shareholder services fees and CDSCs as determined by each Fund. Although applicants currently contemplate creating two classes of shares, in addition to the existing class, under the multiple class distribution system a Fund would be permitted to modify the characteristics of its classes of shares, and issue and sell additional classes of shares. The only difference among the various classes of shares will relate solely to: (a) The impact of the disproportionate payments made under the rule 12b–1 distribution plans or any non-rule 12b–1 shareholder services plans, as applicable; (b) the fact that the classes of shares will vote separately with respect to a Fund's rule 12b–1 distribution plan and/or non-rule 12b–1 shareholder services plan, except as provided in condition 15 below; (c) the conversion feature applicable only to certain classes of shares; (d) the exchange privileges of the classes of shares of a Fund; and (e) the designations of the classes of shares of a Fund.

2. Most of the non-money-market Funds currently sell shares subject to a front-end sales charge and a distribution fee (''Class I Shares''). The Class I Shares of most of the Franklin Funds and Templeton Funds also currently carry a CDSC, which is imposed on shares purchased in amounts of $1 million or more that were initially sold without a front-end sales charge and are redeemed within twelve months of purchase. Under the proposed multiple class distribution system, such Funds will continue to sell Class I Shares. Applicants anticipate issuing a new class of shares (the ''Class II Shares'') that will carry a front-end sales charge (1.00%) at the time of purchase and may be subject to a CDSC of up to 1.00% on redemptions made within eighteen months after purchase. The Class II Shares also will be subject to a rule 12b–1 distribution plan. Applicants anticipate that certain Funds may offer a third class of shares without any front-end sales charge, CDSC, or a rule 12b–1 fee (''Class III Shares''). Class III Shares would be marketed primarily to certain institutional investors such as retirement plans, foundations, endowments, and certain governmental entities.

3. The Fund may create some additional classes of shares which will

[1] Franklin Gold Fund, et al., Investment Company Act Release Nos. 20558 (Sept. 16, 1994) (notice) and 20611 (Oct. 11, 1994) (order).

be offered only to certain institutional offerees (the ''Indirect Investor Classes''). The offerees of the shares of Class I, Class II, Class III and additional classes other than the Indirect Investor Classes (collectively, the ''Direct Investor Classes''), and offerees of the Indirect Investor Classes, will not overlap. The Indirect Investor Classes will be offered exclusively to the following five limited categories of investors: (a) Benefit plans such as qualified retirement plans, other than individual retirement accounts and retirement plans of self-employed persons, with total assets in excess of $5 million or such other amounts as the Funds may establish and with such other characteristics as the Funds may establish; (b) defined contribution retirement plans maintained by the Advisers or their affiliates for the benefit of their employees; (c) banks and insurance companies purchasing shares for their own accounts; (d) registered investment companies not affiliated with the Advisers; and (e) endowment funds of non-profit organizations.

4. All expenses incurred by a Fund will be borne by each class of shares in the same proportion that the net assets attributable to that class bears to such Fund's total net assets except for the expenses of each 12b–1 distribution plan, non-rule 12b–1 shareholder services plan and any expenses determined by the trustees to be properly allocated to a class of shares.

5. Shareholders of one class of shares of a Fund may exchange shares of that class for shares of the same class of another Fund. Additionally, shareholders of a class in which the investor is no longer eligible for participation may exchange his or her shares of such Fund for shares of a Fund in which he or she is eligible to participate. All exchange privileges will comply with rule 11a–3 under the Act.

6. The Funds currently contemplate that the classes of shares of the Funds will not convert to another class of shares. However, the Funds reserve the right to adopt a conversion feature with respect to such classes of shares or future additional classes of shares. A Fund may permit one class of shares (''Purchase Class'') to convert to another class of shares (''Target Class'') after expiration of a certain period. Such Purchase Class shares (except those purchased through the reinvestment of dividends and other distributions) would automatically convert to Target Class shares at the relative net asset values of each of the classes, and would thereafter be subject to a lower rule 12b–1 distribution and/or shareholder services plan fee, in the aggregate. All Purchase Class shares in a shareholder's account that were purchased through the reinvestment of dividends and other distributions paid in respect of Purchase Class (and which have not converted to Target Class) would be considered to be held in a separate sub-account. Each time any shares of the Purchase Class in the shareholder's account (other than those in the sub-account) convert to a Target Class, a proportionate number of the shares of the Purchase Class in the sub-account also will convert to such Target Class.

B. The CDSC

1. Applicants are currently parties to an Existing CDSC Order, which permits the assessment of a CDSC in certain circumstances related to purchases of $1 million or more of fund shares. Any order granted in connection with this application will supersede the Existing CDSC Order and will apply equally to any CDSC imposed on any class of the Funds, as well as any CDSC arrangements to be imposed in the future.

2. The proposed CDSC will not be imposed on redemptions of those shares which were purchased more than a specified period (the ''CDSC Period'') prior to their redemption, or those shares derived from reinvestment of dividends or other distributions including capital gains. Furthermore, no CDSC will be imposed on an amount which represents an increase in the value of the shareholder's account resulting from capital appreciation above the amount paid for shares of beneficial interest purchased during the CDSC Period. In determining the applicability and rate of any CDSC, it would be assumed that a redemption is made first of shares representing capital appreciation, second, of shares representing reinvestment of dividends and capital gains distributions, third, of shares held by the shareholders for a period equal to or greater than the CDSC Period, and finally of other shares held by the shareholder for the longest period of time.

3. Applicants request relief to permit each Fund to waive or reduce the CDSC in certain circumstances. Any waiver or reduction will comply with the conditions in paragraph (a) through (d) of rule 22d-1 of the Act. If the trustees of the Fund determine to discontinue the waiver, deferral or reduction of a CDSC, the disclosure in each Fund's prospectus will be appropriately revised. The sum of any front-end sales charge, asset-based sales charge, and CDSC will comply with the requirements of Article III, Section 26(d) of the Rules of Fair Practice of the National Association of Securities Dealers, Inc. (''NASD'').

Applicants' Legal Analysis

1. Applicants request an exemption under section 6(c) of the Act to the extent that the proposed issuance and sale of multiple classes of shares representing interests in the Funds might be deemed (a) to result in a ''senior security'' within the meaning of section 18(g) of the Act and to be prohibited by section 18(f)(1) of the Act and (b) to violate the equal voting provisions of section 18(i) of the Act. The multiple class distribution system does not involve borrowings and does not adversely affect the Funds' existing assets or reserves. The proposed arrangement will not increase the speculative character of the shares of the Funds.

2. Applicants request an exemption under section 6(c) from sections 2(a)(32), 2(a)(35), 22(c) and 22(d) of the Act and rule 22c-1 thereunder, to the extent necessary to permit the Funds to assess a CDSC on certain redemptions of shares and to permit the Funds to waive or reduce CDSCs with respect to certain types of redemptions. Applicants believe that the imposition of a CDSC on shares in certain classes is fair and in the best interests of its shareholders.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Each class of shares will represent interests in the same portfolio of investments of a Fund and will be identical in all respects, except as set forth below. The only differences among the classes of shares will relate solely to: (a) The impact of the disproportionate payments made under the rule 12b–1 distribution plans and the shareholder services plans (if any), as applicable; (b) other expenses that are subsequently identified and determined to be properly allocated to one or more classes of shares that shall be approved by the SEC pursuant to an amended order; (c) the fact that the classes will vote separately with respect to a Fund's rule 12b–1 distribution plan and non-rule 12b–1 shareholder services plan, except as provided in condition 15, below; (d) the conversion feature applicable only to certain classes of shares; (e) the different exchange privileges of the classes of shares of a Fund; and (f) the designations of the classes of shares of a Fund.

2. The trustees, including a majority of the independent trustees, have approved the multiple class distribution system. The minutes of the meetings of

the trustees regarding the deliberations of the trustees with respect to the approvals necessary to implement the multiple class distribution system will reflect in detail the reasons for the trustees' determination that the proposed multiple class distribution system is in the best interests of both a Fund and its shareholders.

3. On an ongoing basis, the trustees, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor each Fund for the existence of any material conflicts between the interests of the various classes of shares of each respective Fund. The trustees, including a majority of the independent trustees, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Adviser and the Distributor will be responsible for reporting any potential or existing conflicts to the trustees. If a conflict arises, the Adviser and the Distributor, at their own cost, will remedy such conflict up to and including establishing new registered management investment companies.

4. The initial determination of the class expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the board of trustees of the Fund including a majority of the trustees who are not interested persons of the Fund. Any person authorized to direct the allocation and disposition of monies paid or payable by the Fund to meet class expenses shall provide to the board of trustees, and the trustees shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

5. The trustees will receive quarterly and annual statements with respect to each Fund concerning the amounts expended under any non-rule 12b–1 shareholder services plans and any 12b–1 Plans complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any rule 12b–1 or non-rule 12b–1 shareholder services plan fee charged to that class. Expenditures not related to the sale or servicing of a particular class of shares of a Fund will not be presented to the trustees to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent trustees in the exercise of their fiduciary duties.

6. If any class will be subject to a non-rule 12b–1 shareholder services plan, such non-rule 12b–1 shareholder services plan will be adopted and operated in accordance with the procedures set forth in rule 12b–1 (b) through (f) as if the expenditures made thereunder were subject to rule 12b–1, except that shareholders need not enjoy the voting rights specified in rule 12b–1.

7. Dividends paid by a Fund with respect to each class of its shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount, except that expenditures associated with any rule 12b–1 plan or non-rule 12b–1 shareholder services plan relating to a particular class of shares will be borne exclusively by the affected class and any other expenses determined by the trustees to be allocated to a class of shares and that shall have been approved by the SEC pursuant to an amended order will be borne exclusively by that class.

8. The methodology and procedures for calculating the net asset value and dividends and distributions of multiple classes of shares and the proper allocation of expenses among such classes have been reviewed by the Experts. The Experts have rendered reports to the applicants, which reports have been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Experts, or appropriate substitute Experts, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to each Fund that the calculations and allocations are being made properly. The reports of the Experts shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Experts with respect to such reports, following request by a Fund (which each Fund agrees to provide), will be available for inspection by the SEC staff upon written request to the respective Fund for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director and any Regional Administrators or Associate and Assistant Administrators. The initial reports of the Experts are ''Reports on Policies and Procedures Placed in Operation,'' and the ongoing reports will be ''Reports on Policies and Procedures Placed in Operation and Tests of Operating Effectiveness'' as defined and described in SAS No. 70 of the American Institute of Certified Public Accountants (''AICPA''), as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

9. The applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the various classes of shares and the proper allocation of expenses between the various classes of shares, and this representation will be concurred with by the Experts in the initial reports referred to in condition (8) above and will be concurred with by the Experts, or appropriate substitute Experts, on an ongoing basis at least annually in the ongoing reports referred to in condition (8) above. Applicants will take immediate corrective measures if this representation is not concurred in by the Experts or appropriate substitute Experts.

10. The prospectus of each Fund will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling or servicing shares of such Fund may receive different compensation with respect to one particular class of shares over another in the Fund.

11. The Distributor will adopt compliance standards as to when each class of shares may appropriately be sold to particular investors. Applicants will require all persons selling shares of a Fund to agree to conform to such standards. Such compliance standards will require that all investors eligible to purchase shares of the Indirect Investor Classes be sold only shares of such Indirect Investor Classes, rather than any other class of shares offered by a Fund.

12. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the trustees with respect to the multiple class distribution system will be set forth in guidelines that will be furnished to the trustees.

13. Each Fund will disclose the respective expenses, performance data, distribution arrangements, services, fees, sales charges, deferred sales charges, and exchange privileges applicable to each class of shares other than the Indirect Investor Classes in every prospectus, regardless of whether all classes of shares are offered through its respective prospectus. The Indirect Investor Classes will be offered solely

pursuant to separate prospectus(es). The prospectus(es) for the Indirect Investor Classes will disclose the existence of the Fund's other classes and will identify the entities eligible to purchase such shares, and the prospectuses for the Fund's other classes will disclose the existence of the Indirect Investor Classes and will identify the persons eligible to purchase shares of such class. Each Fund will disclose the respective expenses and performance data applicable to all classes of its shares in every shareholder report. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to the Fund as a whole generally and not on a per class basis. Each Fund's per share data, however, will be prepared on a per class basis with respect to all classes of shares of such Fund. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of a Fund's shares, it will also disclose the respective expenses and/or performance data applicable to all of its classes of shares, except the Indirect Investor Classes. Advertising materials reflecting the expenses or performance data for the Indirect Investor Classes will be available only to those persons eligible to purchase such Indirect Investor Classes. The information provided by applicants for publication in any newspaper or similar listing of a Fund's net asset value and public offering price will present each class of shares, except the Indirect Investor Classes, separately.

14. Any class of shares with a conversion feature will convert into another class of shares on the basis of the relative net asset values per share of the two classes of shares, without the imposition of any sales load, fee, or other charge. After conversion, the converted shares will be subject to an asset-based sales charge and/or shareholder services fee (as those terms are defined in Article III, Section 26 of the NASD's Rules of Fair Practice), if any, that in the aggregate are lower than the asset-based sales charge and shareholder services fee to which they were subject prior to the conversion.

15. If a Fund implements any amendment to its rule 12b-1 plan or, if presented to shareholders, adopts or implements any amendment to a non-rule 12b-1 shareholder services plan that would increase materially the amount that may be borne by a Target Class, existing shares of any affected Purchase Class will stop converting into Target Class unless the Purchase Class shareholders, voting separately as a class, approve the proposal. The trustees shall take such action as is necessary to ensure that existing Purchase Class shares are exchanged or converted into a New Target Class, identical in all material respects to the Target Class as it existed prior to implementation of the proposal, no later than such shares previously were scheduled to convert into Target Class. If deemed advisable by the trustees to implement the foregoing, such action may include the exchange of all existing Purchase Class shares for a New Purchase Class, identical to existing Purchase Class shares in all material respects except that the New Purchase Class will convert into the New Target Class. The New Target Class or the New Purchase Class may be formed without further exemptive relief. Exchanges or conversions described in this condition shall be effected in a manner that the trustees reasonably believe will not be subject to federal taxation. In accordance with condition 3, any additional cost associated with the creation, exchange, or conversion of the New Target Class or New Purchase Class shall be borne solely by the Adviser and the Distributor. The Purchase Class shares sold after the implementation of the proposal may convert to the Target Class shares subject to the higher maximum payment, provided that the material features of the Target Class plan and the relationship of such plan to the Purchase Class shares are disclosed in an effective registration statement.

16. Applicants will comply with the provisions of proposed rule 6c-10 under the Act, Investment Company Act Release No. 16619 (Nov. 2, 1988), as such rule is currently proposed and as it may be reproposed, adopted or amended.

17. Applicants acknowledge that the grant of the exemptive order requested by this application will not imply SEC approval, authorization, or acquiescence in any particular level of payments that a Fund may make pursuant to its rule 12b-1 distribution plan or non-rule 12b-1 shareholder services plan in reliance on the exemptive order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2753 Filed 2–3–95; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 20871; 811–7125]

Rivers Funds; Notice of Application

January 31, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the ''Act'').

APPLICANT: Rivers Funds.

RELEVANT ACT SECTION: Section 8(f) of the Act.

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on November 16, 1994, and refiled January 26, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 27, 1995, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicant, Federated Investors Tower, Pittsburgh, Pennsylvania 15222–3779.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Barry D. Miller, Senior Special Counsel, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is registered as an open-end, diversified management company under the Act and organized as a business trust under the laws of the Commonwealth of Massachusetts. On November 23, 1993, applicant filed a Notification of Registration under the Act and a registration statement under the Securities Act of 1933 (the ''1933 Act'') to register an indefinite number of

shares. Applicant never made a public offering of its securities and its registration statement under the 1933 Act was withdrawn pursuant to rule 477 of Regulation C of the 1933 Act as of December 29, 1993.

2. Applicant has no shareholder, liabilities, or assets. Applicant is not a party to any litigation or administrative proceeding.

3. Applicant is not now engaged, nor does it propose to engage in any business activities other than those necessary to wind up its affairs.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2817 Filed 2–3–95; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–20870 / 812–9430]

The Dreyfus/Laurel Funds, Inc. et al.; Notice of Application

January 30, 1995.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1949 (the ''Act'').

APPLICATIONS: The Dreyfus/Laurel Funds, Inc. (''Dreyfus/Laurel Funds'') and The Dreyfus/Laurel Investment Series (''Dreyfus/Laurel Series'').

RELEVANT ACT SECTIONS: Order requested under section 17(b) granting an exemption from section 17(a), and under section 17(d) and rule 17d–1 permitting certain joint transactions.

SUMMARY OF APPLICATION: Applicants request an order to permit Dreyfus International Equity Allocation Fund (the ''Acquiring Fund''), a series of Dreyfus/Laurel Funds, to acquire all of the assets of Dreyfus/Laurel International Fund (the ''Acquired Fund''), a series of Dreyfus/Laurel Series. (The Acquiring Fund and the Acquired Fund are referred to individually as a ''Fund'' and collectively as the ''Fund.'') Because of certain affiliations, the two series may not rely on rule 17a–8 under the Act.

FILING DATE: The application was filed on January 11, 1995.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 24, 1995, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicant, 200 Park Avenue, New York, New York 10166.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Staff Attorney, at (202) 942–0574, or Robert A. Robertson, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Acquiring Fund is one of nineteen series of Dreyfus/Laurel Funds, a Maryland corporation. Dreyfus/Laurel Funds is registered as an open-end management investment company and the shares of the Acquiring Fund are registered under the Securities Act of 1933. The Acquired Fund is one of three series of Dreyfus/Laurel Series, a Massachusetts business trust. Dreyfus/Laurel Series is registered as an open-end management investment company and the shares of the Acquired Fund are registered under the Securities Act.

2. The Dreyfus Corporation (''Dreyfus'') serves as the investment manager to each Fund. Dreyfus is a wholly-owned subsidiary of Mellon Bank, N.A. (''Mellon''), which in turn is a wholly-owned subsidiary of Mellon Bank Corporation.

3. Mellon holds with power to vote more than 50% of the outstanding shares of the Acquiring Fund and controls Dreyfus. The Acquiring Fund currently offers two classes of shares, Investor Class shares and Class R shares. Class R shares are sold primarily to bank trust departments and other financial service providers. The objective of the Acquiring Fund is to exceed the total return of the Morgan Stanley Capital International—Europe Australia Far East Index benchmark through active stock selection, country allocation and currency allocation. The Acquired Fund, currently offering only Investor Class shares, seeks long-term growth in capital by investing in common stocks and securities convertible into common stock of companies located outside the United States. Neither Fund imposes a sales charge in connection with the purchase or redemption of shares.

4. The Acquiring Fund proposes to acquire all or substantially all of the assets of the Acquired Fund in exchange for Investor Class shares of the Acquiring Fund on or about May 1, 1995, the closing date. The number of full and fractional Investor Class shares of the Acquiring Fund to be issued to shareholders of the Acquired Fund will be determined on the basis of the relative net asset values of the Acquired Fund and the Acquiring Fund. After the closing date, the Acquired Fund will liquidate and distribute *pro rata* to its shareholders of record the Investor Class shares of the Acquiring Fund received by it in the reorganization. After such distribution and the winding up of its affairs, the Acquired Fund will be terminated.

5. An agreement and plan of reorganization (the ''Reorganization Agreement'') was unanimously approved by the board of directors of Dreyfus/Laurel Funds, including the non-interested directors, and by the board of trustees of the Dreyfus/Laurel Series, including the independent trustees, on December 20, 1994. In the assessment of the reorganization and the terms of the Reorganization Agreement, the factors considered by the boards of Dreyfus/Laurel Funds and Dreyfus/Laurel Series included: (a) the relative past growth in assets and investment performance of the Funds; (b) the future prospects of the Funds, both under circumstances where they are not reorganized and where they are reorganized; (c) the compatibility of the investment objectives, policies and restrictions of the Acquiring Fund and the Acquired Fund; (d) the effect of the reorganization on the expense ratios of each Fund; (e) the costs of the reorganization to the Funds; (f) whether any future cost savings could be achieved by combining the Funds; (g) the tax-free nature of the reorganization; and (h) alternatives to the reorganization.

6. The Dreyfus/Laurel Series will submit the proposed reorganization plan to the shareholders of the Acquired Fund for their approval at a meeting expected to be held in April, 1995. Shareholders of the Acquired Fund will receive a notice of the special meeting of shareholders and a prospectus/proxy statement. A majority of the outstanding shareholders of the Acquired Fund must approve the reorganization. The expenses of the reorganization will be borne by Dreyfus. In addition to shareholder approval, the

consummation of the reorganization is conditioned upon receipt from the SEC of the order requested herein.

Applicants' Legal Analysis

1. Section 17(a) of the Act, in pertinent part, prohibits an affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, from selling to or purchasing from such registered company, any security or other property. Section 17(b) provides that the SEC may exempt a transaction from section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act.

2. Rule 17a–8 under the Act exempts from the prohibitions of section 17(a) mergers, consolidations, or purchases or sales of substantially all the assets involving registered investment companies that may be affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors/trustees and/or common officers provided that certain conditions are satisfied.

3. The proposed reorganization may not be exempt from the prohibitions of section 17(a) by reason of rule 17a–8 because the Acquiring Fund and the Acquired Fund may be affiliated for reasons other than those set forth in the rule. Mellon owns 100% of the outstanding voting securities of Dreyfus, the adviser to the Acquired Fund. In addition, Mellon holds with power to vote more than 50% of the outstanding voting securities of the Acquiring Fund. Therefore, the Acquiring Fund may be deemed an affiliated person of the Acquired Fund for reasons not based solely on their common adviser.

4. Applicants believe that the terms of the reorganization satisfy the standards of section 17(b). Each Fund's board, including the disinterested trustees and directors, has reviewed the terms of the reorganization and have found that participation in the reorganization as contemplated by the Reorganization Agreement is in the best interests of Dreyfus/Laurel Funds, Dreyfus/Laurel Series, and each Fund, and that the interests of existing shareholders of each Fund will not be diluted as a result of the reorganization. Each board considered the compatibility of the investment objectives, policies and restrictions of the two Funds and found that they were similar in that both Funds emphasized investment in international equity securities.

5. Section 17(d) prohibits any affiliated person of a registered investment company, acting as principal, from effecting any transaction in which such registered investment company is a joint participant with such person in contravention of SEC rules and regulations. Rule 17d–1 provides that no joint transaction may be consummated unless the SEC first approves the transaction.

6. The Funds may be affiliated persons of each other, and the proposed transaction might be deemed to be a joint enterprise or other joint arrangement. Applicants believe that the terms of the reorganization are consistent with the provisions, policies and purposes of the Act in that they are reasonable and fair to all parties, do not involve overreaching, and are consistent with the investment policies of each of the Funds. The participation in the reorganization by each Fund also is not on a basis different from or less advantageous than that of other participants.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2818 Filed 2–3–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–35298; File Nos. SR–NYSE–94–48 and SR–PSE 94–37]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. and the Pacific Stock Exchange, Inc., Relating to the Off-Site Storage of Customer Options Account Information

January 30, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 20, 1994, the New York Stock Exchange, Inc. (''NYSE''),[2] and on December 23, 1994, the Pacific Stock Exchange, Inc. (''PSE'') (together, the ''Exchanges''), submitted to the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule changes as described in Items I and II below, which Items have been prepared by the Exchanges. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Changes

Currently, paragraph (c), ''Maintenance of Customer Records,'' of NYSE Rule 722, ''Supervision of Accounts,'' and paragraph (d)(3), ''Maintenance of Customer Records,'' of PSE Rule 9.18, ''Doing a Public Business in Options,'' require that background and financial information of customers be maintained at both the branch office servicing the customer's account and at the principal supervisory office with jurisdiction over the branch office. NYSE Rule 722(c) and PSE Rule 9.18(d)(3) also require that copies of account statements of options customers be maintained at both the branch office supervising the accounts and at the principle supervisory office with jurisdiction over that branch for the most recent six-month period. The Exchanges propose to amend their rules to provide that the customer information and account statements currently maintained at the principal supervisory office may be maintained at a location other than the principal supervisory office if the documents and information are readily accessible and promptly retrievable.

The text of the proposed rule changes is available at the Office of the Secretary, NYSE, at the Office of the Secretary, PSE, and at the Commission.

II. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In their filings with the Commission, the self-regulatory organizations included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organizations have prepared summaries, set forth in Section (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organizations' Statements of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

Currently, the rules of the NYSE and the PSE require that both the branch

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] On January 27, 1995, the NYSE submitted a letter requesting accelerated approval of its proposal. *See* Letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Glenn Barrentine, Team Leader, Division of Market Regulation, Commission, dated January 27, 1995.

office servicing an options customer's account and the principal supervisory office having jurisdiction over the branch office retain account statements and other financial and background information for the account for supervisory purposes. With advances in data storage and retrieval capability available through optical disks, fax machines, microfiche and computers, coupled with the escalating costs of storing records on-site, member organizations increasingly are storing their records away from their principal supervisory offices.

According to the NYSE, NYSE members have obtained no-action positions from the Options Self-Regulatory Council (''OSRC'')[3] on a case-by-case basis when moving their operational facilities off-site. The OSRC has determined that these arrangements are consistent with the record retention requirement rules so long as the documents are readily accessible and promptly retrievable. In view of the number of requests received by the options self-regulatory organizations (''SROs''), the OSRC has asked each of the options exchanges and NASD to consider amending their rules to permit the principal supervisory office to store customer account information off-site.

The Exchanges propose to amend their rules accordingly. The Exchanges believe that the off-site storage arrangements are consistent with the record retention requirement rules, provided the documents are readily accessible and promptly retrievable.[4] In addition, the Exchanges do not believe that the supervisory obligations of member organizations will be compromised by the proposal since members will continue to be required to maintain customer option account documents and information at the branch office servicing the customer's account. To ensure compliance with the provisions of the rules, the Exchanges state that they will periodically examine the document retrieval capabilities of member firms using off-site document storage arrangements.

The Exchanges believe that the proposed rule changes are consistent with Section 6(b) of the Act, in general, and further the objectives of Section 6(b)(5), in particular, in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest.

Additionally, the NYSE believes that the proposal will promote the maintenance of fair and orderly markets because it will provide member organizations with the opportunity to discharge their supervisory responsibilities in a more cost-effective manner, thereby improving the efficiency of NYSE member organizations, and, in turn, benefitting investors in the marketplace. Moreover, because the NYSE does not believe that the proposal will compromise the ability of members to satisfy their supervisory obligations, the NYSE believes the proposal is consistent with the protection of investors.

(B) Self-Regulatory Organizations' Statement on Burden on Competition

The Exchanges do not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organizations' Statement on Comments on the Proposed Rule Changes Received From Members, Participants or Others.

No written comments were either received or requested.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

The Exchanges have requested that the proposed rule changes be given accelerated effectiveness pursuant to Section 19(b)(2) of the Act.

The Commission believes that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5) in that they are designed to prevent fraudulent and manipulative acts and practices, to facilitate transactions in securities, and to protect investors and the public interest.[5]

Specifically, by allowing off-site storage of customer account information maintained at supervisory offices, the Commission believes that the proposal should provide the Exchanges' members with a cost-effective means to utilize computers, facsimile machines, optical disks, and other technology to store the required customer account information off-site while ensuring that member firms will continue to have easy access to all of the customer account information necessary to discharge their supervisory responsibilities. In this regard, the proposals provide that options customer account information stored off-site must be ''readily accessible and promptly retrievable,''[6] thereby preserving the ability of the Exchanges to access and investigate customer account records. The Commission notes that the Exchanges plan to periodically examine the document retrieval capabilities of member firms using off-site storage arrangements. Thus, the Commission believes that both proposals strike a reasonable balance between the Exchanges' interest in allowing member organizations to reduce the cost of storing customer account information and ensuring that the information continues to be available for supervisory purposes.

In addition, the Commission believes that it is reasonable for the Exchanges to allow off-site storage of customer account information maintained at supervisory offices, but not of account information stored at branch offices, because branch offices are responsible for the day-to-day administration of customer accounts and require immediate access to account information. For example, by continuing to require branch offices to store customer account information on-site, the proposal facilitates broker compliance with the suitability requirements applicable to options customers.

The Commission finds good cause for approving the Exchanges' proposals prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** because the proposals are identical to previously approved proposals submitted by the Chicago Board Options Exchange, Inc. (''CBOE''), the Philadelphia Stock Exchange, Inc. (''PHLX'') and the American Stock Exchange, Inc.

[3] The ORSC is a committee comprised of representatives from each of the options exchanges and the National Association of Securities Dealers, Inc. (''NASD''). The OSRC was created pursuant to the plan submitted by the options SROs under Rule 17d–2 of the Act (''17d–2 Plan''). The 17d–2 Plan was adopted to reduce regulatory duplication relative to options-related sales practice matters for a large number of firms which are currently members of two or more SROs. The purpose of the OSRC is: (1) to administer the 17d–2 Plan; and (2) to address options-related sales practice matters in a common forum.

[4] The NYSE defines ''readily accessible and promptly retrievable'' to mean that the requested information will be available by noon of the next business day. The PSE defines ''readily accessible and promptly retrievable'' to mean that the requested information can be returned to the principal supervisory office generally within 24 hours.

[5] 15 U.S.C. 78f(b)(5) (1988).

[6] See note 4, *supra.*

(''Amex'').[7] The CBOE and PHLX proposals were subject to the full notice and comment period and the Commission received no comments on those proposals. Therefore, the Commission believes it is consistent with Sections 6(b)(5) and 19(b)(2) of the Act to approve the Exchanges' proposals on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submitt written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of each filing will also be available for inspection and copying at the principal office of the respective above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by February 24, 1995.

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule changes (File Nos. SR–NYSE–94–48 and SR–PSE–94–37) are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2751 Filed 2–3–95; 8:45 am]

BILLING CODE 8010–01–M

[7] See Securities Exchange Act Release Nos. 34899 (October 26, 1994), 59 FR 54929 (November 2, 1994) (order approving File No. SR–CBOE–94–30); 34909 (October 27, 1994), 59 FR 55144 (November 3, 1994) (order approving File No. SR–PHLX–94–35); and 34913 (October 28, 1994), 59 FR 55300 (November 4, 1994) (order approving File No. SR–Amex–94–37).

[8] 15 U.S.C. 78s(b)(2) (1982).

[9] 17 CFR 200.30–3(a)(12) (1994).

[Release No. 34–35297; File No. SR–CBOE–94–50]

Self-Regulatory Organizations; Order Granting Accelerated Approval to a Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to As-of-Add Submissions

January 30, 1995.

On December 1, 1994, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] filed with the Securities and Exchange Commission (''Commission'') a proposed rule change relating to the fees assessed by the Exchange against members pursuant to Exchange Rule 2.26 for submitting trade information under Exchange Rule 6.51[3] after the trade date (each an ''as-of-add''). Notice of the proposal and the Commission's order granting partial accelerated approval of the proposal appeared in the **Federal Register** on January 12, 1995.[4] No comment letters were received on the proposed rule change. This order approves the remaining portion of the CBOE proposal.

The purpose of the proposed rule change was to amend the as-of-add fee pilot program in three ways and to have the pilot program, as amended, made permanent. The Commission has already approved those portions of the proposal: (1) Permanently approving the as-of-add fee pilot program; (2) placing a ceiling on the monthly as-of-add fee that can be assessed against individual and clearing members pursuant to CBOE Rule 2.26; and (3) amending Rule 2.26 to authorize the Exchange to suspend rule 2.26 (and thereby waive the as-of-add fees that would otherwise be due) in exigent circumstances.[5]

The only portion of the proposal which has not yet been approved by the Commission is a proposed amendment to CBOE Rule 17.50(g) to include a fine schedule for substantial and repeated submissions by members of as-of-adds (''Minor Rule Plan Amendment''). Specifically, any member who exceeds the as-of-add rate considered nominal under Rule 2.26 by three times or more for two consecutive months[6] would be subject to a fine of $250 for the first offense, $500 for the second offense, and $1,000 for each offense thereafter occurring during any 12-month period.[7] The fines imposed pursuant to Rule 17.50(g) would be in addition to any fees due under Rule 2.26 and would serve to penalize those members who submit the greatest number of excessive as-of-add trades. Furthermore, in any circumstance in which a member's use of as-of-adds suggests that it may be appropriate to impose more severe disciplinary sanctions than would be provided for under Rule 17.50(g), the member would be subject to investigation and discipline in accordance with Chapter XVIII of CBOE's rules.[8]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5).[9] Specifically, the Commission finds that incorporating a fine schedule into Rule 17.50(g) for substantial and repeated submissions of as-of-adds fees addresses the suggestions previously noted by the

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1992).

[3] Among other things, Rule 6.51 requires that each transaction be immediately reported to the Exchange in a form and manner prescribed by the Exchange. *See* Rule 6.51(a).

[4] See Securities Exchange Act Release No. 35190 (January 3, 1995), 60 FR 3008 (January 12, 1995) (''Exchange Act Release No. 35190'').

[5] Id.

[6] The nominal as-of-add rate is currently 2.4% of an individual member's monthly trades and 1.2% of a clearing member's monthly trades. Accordingly, fines under this proposal would currently be triggered for an individual member whenever that member's as-of-add submissions equal or exceed 7.2% of total trade submissions in each of two consecutive months, while fines to clearing firms would be triggered whenever a clearing member's as-of-add submissions equal or exceed 3.6% of total trade submissions for each of two consecutive months.

[7] These fines would be assessed on a rolling basis. For example, an individual member who is cited for a first offense for a minor rule violation for exceeding the nominal allowable number of as-of-adds by three or more times during each of December and January would be fined for a second offense if that member again exceeds the allowable number of as-of-adds by three or more times during February. See Exchange Act Release No. 35190, *supra* note 4.

[8] The CBOE has issued a Regulatory Circular to members describing the portions of the proposal previously approved and the Minor Rule Plan Amendment. The Commission notes, however, that this Regulatory Circular stated that the Minor Rule Plan Amendment would apply retroactively as of January 1, 1995. *See* CBOE Regulatory Circular RG94–85, dated December 28, 1994. Because the Commission generally does not approve the retroactive application of rule changes, particularly with regard to the assessment of fees and fines, immediately following approval of the Minor Rule Plan Amendment, the Exchange will issue another Regulatory Circular notifying members of the approval and the revised implementation date for Minor Rule Plan Amendment, which is tentatively scheduled for February 1, 1995. This Regulatory Circular will also emphasize that serious instances or extended periods of as-of-add submissions will be subject to investigation and possible disciplinary action notwithstanding Rule 17.50(g).

[9] 15 U.S.C. 78f(b)(5) (1988).

Commission concerning the assessment of as-of-add fees[10] and may serve to further reduce the total number of as-of-adds by providing a clear sanction in those circumstances in which discipline is clearly appropriate. As a result, the Commission believes that the proposal should benefit all Exchange members, and ultimately investors, by increasing the efficiency with which Exchange transactions are processed as well as helping the Exchange to defray the additional costs it incurs with the processing of as-of-adds.

The Commission believes that an exchange's ability to effectively enforce compliance by its members and member organizations with Commission and Exchange rules is central to its self-regulatory functions. The inclusion of a rule in an exchange's minor rule violation plan, therefore, should not be interpreted to mean that it is not an important rule. On the contrary, the Commission recognizes that the inclusion of minor violations of particular rules under a minor rule violation plan may make the exchange's disciplinary system more efficient in prosecuting more egregious and/or repeated violations of these rules, thereby furthering its mandates to protect investors and the public interest.

The Commission believes that adding the Minor Rule Plan Amendment is consistent with Sections 6(b)(5) and 6(b)(6) of the Act in that the purpose of Rule 17.50 is to provide for a response to a violation of Exchange rules or policy when a meaningful sanction is needed, but when initiation of a disciplinary proceeding pursuant to CBOE Rule 17.2 *et seq.* is not suitable because such a proceeding would be more costly and time-consuming than would be warranted given the nature of the violation. Rule 17.50 provides for an appropriate response to minor violations of certain Exchange rules, while preserving the due process rights of the party accused through specified, required procedures.

Furthermore, the Commission finds that violations of the Minor Rule Plan Amendment are objective and easily verifiable, thereby lending itself to the use of expedited proceedings. Noncompliance with Rule 17.50(g) may be determined objectively and adjudicated quickly without the complicated factual and interpretative inquiries associated with more sophisticated Exchange disciplinary proceedings. If the Exchange determines that a violation of Rule 17.50(g) is not minor in nature, the Exchange retains the discretion to initiate full disciplinary proceedings in accordance with Chapter XVII of CBOE's rules. The Commission expects the CBOE to bring full disciplinary proceedings in appropriate cases (e.g., in cases where the violation is egregious or where there is a history or pattern of repeat violations).

The Commission finds good cause for approving the Minor Rule Plan amendment prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** in order to provide the Exchange with adequate time to notify members of the approval of the Minor Rule Plan Amendment prior to the scheduled implementation date of February 1, 1955.[11] Because any fines to be assessed pursuant to the Minor Rule Plan Amendment will be based on calendar month submissions of as-of-adds, accelerated approval will allow the Exchange to begin receiving the benefits of the rule without having to delay implementation for an additional month. Additionally, because the Exchange has already distributed a Regulatory Circular to members stating that the Minor Rule Plan Amendment, once approved, would be given retroactive effectiveness to January 1, 1995,[12] members are already on notice of the proposal and will not, in the Commission's opinion, be harmed by shifting the implementation date to February 1, 1995. Accordingly, the Commission believes it is consistent with Sections 6(b)(5) and 19(b)(2) of the Act to approve the remaining portion of the proposed rule change on an accelerated basis.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (File No. SR–CBOE–94–50) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–2750 Filed 2–3–95; 8:45 am]

BILLING CODE 8010–01–M

[10] *See* Securities Exchange Act Release No. 34783 (October 3, 1994), 59 FR 51459 (October 11, 1994).

[11] *See supra* note 8.

[12] *Id.*

[13] 15 U.S.C. 78s(b)(2) (1988).

[14] 17 CFR 200.30–3(a)(12) (1994).

SMALL BUSINESS ADMINISTRATION

Declaration of Disaster Loan Area #2760 California; Declaration of Disaster Loan Area (Amendment #1)

The above-numbered Declaration is hereby amended, effective immediately, to establish the occurrence as resulting from winter storms causing flooding, landslides, mud and debris flows beginning on January 3, 1995, continuing.

All other information remains the same, i.e., the termination date for filing applications for physical damage is March 13, 1995, and for economic injury the deadline is October 10, 1995.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: January 30, 1995.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 95–2769 Filed 2–3–95; 8:45 am]

BILLING CODE 8025–01–M

Declaration of Disaster Loan Area#2761, Washington; Declaration of Disaster Loan Area

Mason County and the contiguous counties of Grays Harbor, Jefferson, Kitsap, and Thurston in the State of Washington constitute a disaster area as a result of damages caused by heavy rains and flooding which occurred throughout December of 1994. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on March 30, 1995 and for economic injury until the close of business on October 27, 1995 at the address listed below: U.S. Small Business Administration, Disaster Area 4 Office, P.O. Box 13795, Sacramento, CA 95853–4795; or other locally announced locations.

The Interest Rates Are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	8.000
Homeowners Without Credit Available Elsewhere	4,000
Businesses With Credit Available Elsewhere	8.000
Businesses and Non-profit Organizations Without Credit Available Elsewhere	4.000
Others (Including Non-profit Organizations) With Credit Available Elsewhere	7.125
For Economic Injury:	
Businesses and Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 276106 and for economic injury the number is 844100.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: January 27, 1995.

Philip Lader,

Administrator.

[FR Doc. 95–2768 Filed 2–3–95; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements filed during the Week Ended January 27, 1995

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: 50092.
Date filed: January 23, 1995.
Parties: Members of the International Air Transport Association.
Subject: TC23 Telex Mail Vote 726, Apply Note 011 to Ukraine-TC3 fares.
Proposed Effective Date: February 1, 1995.

Docket Number: 50093.
Date filed: January 23, 1995.
Parties: Members of the International Air Transport Association.
Subject: TC12 Fares 0457 dated January 20, 1995, US–UK Add-on Fares.
Proposed Effective Date: April 1, 1995.

Myrna F. Adams,

Acting Chief, Documentary Services Division.

[FR Doc. 95–2807 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–62–P

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended January 27, 1995

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: 50089.
Date filed : January 23, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 26, 1995.
Description: Application of American Airlines, Inc., pursuant to 49 U.S.C. 41108 and Subpart Q of the Regulations, for amendment of its certificate for Route 325 (restriction removal, mandatory Toronto stop between Dallas/Ft. Worth and Montreal).

Docket Number: 50090.
Date filed: January 23, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 21, 1995.
Description: Application of LTU Lufttransport-Unternehmen GmbH. & Co. KG, pursuant to 49 U.S.C. Section 41302, and Subpart Q of the Regulations, applies to add Tampa, Florida to its Foreign Air Carrier Permit as a coterminal point for scheduled service between Germany and the United States.

Docket Number: 50097.
Date filed: January 26, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 23, 1995.
Description: Application of American Airlines, Inc., pursuant to 49 USC 4112 CFR Part 377 and Subpart Q of the Regulations, applies for renewal of authority to serve Istanbul and Ankara, Turkey on segment 3 of its certificate for Route 602, issued in the American-TWA Route Transfer by Order 91–4–47, April 25, 1991. Segment 3 authorizes services: ''Between a point or points in the United States (excluding St. Louis, MO, and New York, NY-Newark, NJ) and Barcelona, Spain; Casablanca, Morocco; Istanbul and Ankara, Turkey; Austria; Bahrain; Qatar; and the United Arab Emirates.''

Docket Number: 50099.
Date filed: January 26, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 23, 1995.
Description: Application of Continental Airlines, Inc. pursuant to Section 49 U.S.C. Section 41102 and Subpart Q of the Regulations, requests renewal of its Route 482 certificate authority to provide scheduled foreign air transportion of persons, property and mail between Houston, Texas and London, U.S. and to integrate its Route 482 authority with Continental authority at other points.

Docket Number: 50102.
Date filed: January 27, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 24, 1995.
Description: Application of Air Operations Of Europe AB, pursuant to Title 49 U.S.C. Part 211 and Subpart Q of the Regulations, applies for a foreign air carrier permit to engage in the charter foreign air transportation of persons and property between a point or points in Sweden, Denmark and Norway and a point or points in the United States.

Docket Number: 50064.
Date filed: January 26, 1995.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: February 23, 1995.
Description: Application of Trans World Airlines, Inc., pursuant to 49 U.S.C. Section 41101, applies for a certificate of public convenience and necessity to engage in foreign air transportation of persons, property and mail between St. Louis, on the one hand, and Toronto, Canada, on the other hand. In addition to its Year One proposal, TWA proposes to add two additional St. Louis - Toronto frequencies when they become available in Year Three. Therefore it is applying here for two additional Year Three Toronto frequencies.

Myrna F. Adams,

Acting Chief, Documentary Services Division.

[FR Doc. 95–2806 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–62–P

Federal Railroad Administration

Petition for a Waiver of Compliance

In accordance with 49 CFR §§ 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance with certain requirements of Federal railroad safety regulations. The individual petitions are described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested and the petitioner's arguments in favor of relief.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.*, Waiver Petition Docket No. HS–94–1) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. Communications received before March 17, 1995 will be considered by FRA before final action is taken. Comments

received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590.

The waiver petitions are as follows:

James River Corporation (ZJRC); FRA Waiver Petition Docket Nos. RSOR–94–1, RSOP–94–5, RSAD–94–1, HS–94–3, RSEQ–94–7

The James River Corporation seeks a permanent exemption from all requirements associated with title 49 Code of Federal Regulations parts 217, Railroad Operating Rules, 218, Railroad Operating Practices, 219, Control of Alcohol and Drug Use, 228, Hours of Service, and 240, Qualification of Certification Locomotive Engineers. The James River Corporation operates a plant railroad inside their Naheola paper mill, located in Pennington, Alabama, and occasionally operates over the Meridian and Bigbee Railroad (MBRR), which is also owned by James River Corporation. The method of operation on the MBRR is yard limits. The petitioner indicates that granting of the exemption will greatly facilitate the movement of cars within the yard limits and is in the public interest and will not adversely affect safety.

Issued in Washington, D.C. on January 31, 1995.

Phil Olekszyk,

Acting Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 95–2804 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–06–P

Petition for Waiver of Compliance

In accordance with 49 CFR §§ 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received from the Indiana Railway Museum on its behalf and behalf of Mr. David E. McClure, a car owner, a request for waiver of compliance with certain requirements of the Federal rail safety regulations. The petition is described below, including the regulatory provisions involved, the nature of the relief being requested and the petitioner's arguments in favor of relief.

Indiana Railway Museum (IRM) (French Lick West Baden and Southern Railway) FLWB; Waiver Petition Docket Number SA–94–9

The IRM seeks a waiver of compliance from certain sections of the Railroad Safety Appliance Standards (49 CFR part 231). IRM is requesting a permanent waiver of the provisions of 49 CFR 231.13(b)(2) requiring that horizontal end handholds be flush with or project not more than 1-inch beyond surface of end sill and 231.13(b)(3) location: Horizontal, one near each side of each end on face of platform end sill, projecting downward. The IRM request that these requirements be waived for passenger car number FLWB 500 ''Indianapolis.'' Passenger car FLWB 500 was equipped with 480 volt wiring and receptacles which necessitated the B-end horizontal end handholds to be bent outward in excess of 1-inch from the end sill to provide the 2-inch minimum clearance.

Passenger car FLWB 500 ''Indianapolis'' is privately owned and is available for charter in Amtrak trains, excursion railroads, and may be hauled in freight trains during some movements. The car is also available for use in Mexico.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number SA–94–9) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, FRA, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. Communications received before March 17, 1995 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street S.W., Washington, D.C. 20590.

Issued in Washington, D.C. on January 31, 1995.

Phil Olekszyk,

Acting Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 95–2803 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–06–P

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects in the exhibit, ''Sacred Art of Russia from Ivan the Terrible to Peter the Great'' (see list [1]) imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the temporary exhibition of the objects at the Cobb Galleria Centre of Atlanta, Georgia from on or about May 12, 1995, to on or about July 25, 1995, is in the national interest.

Public notice of this determination is ordered to be published in the **Federal Register**.

Dated: January 31, 1995.

Les Jin,

General Counsel.

[FR Doc. 95–2848 Filed 2–3–95; 8:45 am]

BILLING CODE 8230–01–M

DEPARTMENT OF VETERANS AFFAIRS

Veterans' Advisory Committee on Rehabilitation; Meeting

The Department of Veterans Affairs gives notice that a meeting of the Veterans' Advisory Committee on Rehabilitation, authorized by 38 U.S.C., Section 3121, will be held on February 12, 13, and 14, 1995, in Washington, DC. The committee will meet from 10 a.m. to 3 p.m. on February 12, from 9 a.m. to 4 p.m. on February 13, and from 9 a.m. to 12 noon on February 14, 1995. The purpose of the meeting will be to review the administration of veterans' rehabilitation programs and to provide recommendations to the Secretary. The meeting will be open to the public up to the seating capacity of the meeting room. Due to changes in the location of the meeting area each day, it will be necessary for those wishing to attend to

[1] A copy of this list may be obtained by contacting Ms. Neila Sheahan of the Office of the General Counsel of USIA. The telephone number is 202/619–5030, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547.

contact Theresa Boyd at 200-273-7412 prior to February 10, 1995. Interested persons may attend, appear before, or file statements with the Committee. Statements, if in written form, may be filed before or within 10 days after the meeting. Oral statements will be heard at 3:30 p.m. on February 13, 1995.

Dated: January 25, 1995.

By Direction of the Secretary.

Heyward Bannister,

Committee Management Officer.

[FR Doc. 95–2787 Filed 2–3–95; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register

Vol. 60, No. 24

Monday, February 6, 1995

This section of the FEDERAL REGISTER contains notices of meetings published under the ''Government in the Sunshine Act'' (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ENERGY REGULATORY COMMISSION

The following notice of meeting is published pursuant to Section 3(a) of the Government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C. 552b:

DATE AND TIME: February 8, 1995, 10:00 a.m.

PLACE: 825 North Capitol Street, N.E., Room 9306, Washington, D.C. 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda.

Note.—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Lois D. Cashell, Secretary, Telephone (202) 208–0400. For a recording listing items stricken from or added to the meeting, call (202) 208–1627.

This is a list of matters to be considered by the Commission. It does not include a listing of all papers relevant to the items on the agenda; however, all public documents may be examined in the Reference and Information Center.

Consent Agenda—Hydro, 624th Meeting—February 8, 1995, Regular Meeting (10:00 a.m.)

CAH–1.
Project No. 2389–010, Edwards Manufacturing Company, Inc. and City of Augusta, Maine
CAH–2.
Project No. 2407–022, Alabama Power Company
Project Nos. 2376–009, 2466–011 and 2514–010, Appalachian Power Company
Project No. 432–011, Carolina Power & Light Company
Project No. 2541–010, Cascade Power Company
Project No. 2519–013, Central Maine Power Company
Project Nos. 2396–004, 2397–004, 2399–005, 2400–004, 2489–004 and 2490–003, Central Vermont Public Service Company
Project No. 3862–014, City of LeClaire, Iowa
Project No. 2446–008, Commonwealth Edison Company
Project Nos. 2436–025, 2447–025, 2448–032, 2449–022, 2450–021, 2451–020, 2452–026, 2453–019, 2468–020, 2580–036 and 2599–024, Consumers Power Company
Project No. 10371–005, CPS Products, Inc.
Project No. 11351–002, Debra Whitehead
Project No. 2608–004, Decorative Specialties International, Inc.
Project No. 10661–020, Indiana Michigan Power Company
Project No. 11392–004, J & T Hydro Company
Project No. 10455–007, JDJ Energy Company
Project Nos. 2300–007, 2311–008, 2326–007, 2327–008 and 2422–009, James River—New Hampshire Electric, Inc.
Project No. 1922–015, Ketchikan Public Utilities
Project No. 10684–009, Lansing Board of Water and Light
Project No. 2367–014, Maine Public Service Company
Project No. 10895–004, Michiana Hydro-Electric Power Corporation
Project No. 9222–007, Niagara Mohawk Power Corporation
Project No. 10047–004, Northern Hydro Consultants, Inc.
Project Nos. 2440–018 and 2711–005, Northern States Power Company
Project No. 1333–020, Pacific Gas and Electric Company
Project No. 2420–007, PacifiCorp Electric Operations
Project No. 2287–007 and 2288–009, Public Service Company of New Hampshire
Project No. 2333–009, Rumford Falls Power Company
Project No. 2689–004, Scott Paper Company
Project No. 2561–014, Sho-Me Power Corporation
Project No. 2392–011, Simpson Paper Company
Project No. 1394–015, Southern California Edison Company
Project No. 2411–007, STS Hydropower and Dan River, Inc.
Project No. 11426–002, T.A. Keck, III and H.S. Keck
Project No. 2544–011, Washington Water Power Company
Project Nos. 2347–003 and 2348–006, Wisconsin Power & Light Company
CAH–3.
Docket No. RM93–23–001, Project Decommissioning at Relicensing
Docket No. RM93–25–001, Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts
CAH–4.
Project No. 1333–003, Pacific Gas and Electric Company
CAH–5.
Project No. 2157–084, Snohomish County Public Utility District No. 1 and City of Everett, Washington
CAH–6.
Project Nos. 2396–003, 2397–003, 2399–004 and 2400–003, Central Vermont Public Service Corporation
CAH–7.
Project No. 11465–001, Androscoggin Hydroelectric Company, Inc.
CAH–8.
Project No. 4797–034, Cogeneration, Inc.

Consent Agenda—Electric

CAE–1.
Docket No. ER95–67–000, WestPlains Energy, a division of UtiliCorp United, Inc.
CAE–2.
Docket No. ER95–267–000, New England Power Company
CAE–3.
Docket No. ER95–288–000, Central Maine Power Company
CAE–4.
Docket No. ER93–985–000, New England Power Pool
CAE–5.
Docket No. EL87–51–004, Cajun Electric Power Cooperative, Inc. v. Gulf States Utilities Company
Docket No. ER88–477–004, Gulf States Utilities Company
CAE–6.
Docket No. ER94–1529–001, Mid-Continent Area Power Pool
CAE–7.
Docket Nos. ER93–465–006, ER93–922–004, ER93–507–003, EL93–40–002, EL94–12–002 and EL93–28–002, Florida Power & Light Company
CAE–8.
Docket No. FA89–28–004, System Energy Resources, Inc.
CAE–9.
Docket No. EG95–14–000, Coulonge Power and Company, Limited
CAE–10.
Docket No. EG95–15–000, The Power Generation Company of Trinidad and Tobago Limited
CAE–11.
Docket No. AC95–19–000, Century Power Corporation

Consent Agenda—Oil and Gas

CAG–1.
Docket No. RP94–43–009, ANR Pipeline Company
CAG–2.
Docket No. RP95–126–000, Texas Eastern Transmission Corporation
CAG–3.
Docket No. RP93–36–011, Natural Gas Pipeline Company of America
CAG–4.
Docket No. RP95–28–001, Williams Natural Gas Company
CAG–5.
Docket Nos. RP95–110–000 and 001, Williston Basin Interstate Pipeline Company
CAG–6.
Docket No. RP95–2–000, Williams Natural Gas Company
CAG–7.
Docket No. PR93–4–000, Transok, Inc.
CAG–8.

Omitted
CAG–9.
Docket No. RP91–41–030, Columbia Gas Transmission Corporation
CAG–10.
Docket Nos. CP93–565–003 and RP94–314–002, Texas Eastern Transmission Corporation
CAG–11.
Docket No. RP94–409–000, National Fuel Gas Supply Corporation
CAG–12.
Docket No. RP95–47–000, Southern Natural Gas Company
CAG–13.
Docket Nos. RP94–21–000, 001 and RP94–416–000, Northern Natural Gas Company
CAG–14.
Docket No. RP90–137–015, Williston Basin Interstate Pipeline Company

CAG–15.
Docket No. RP91–26–012, El Paso Natural Gas Company
CAG–16.
Docket No. RP93–172–007 and RP94–238–002, Panhandle Eastern Pipe Line Company
CAG–17.
Docket No. RP94–164–005, Trunkline Gas Company
CAG–18.
Docket No. RP94–428–000, Natural Gas Pipeline Company of America
CAG–19.
Omitted
CAG–20.
Docket No. RP95–125–000, Midwestern Gas Transmission Company
CAG–21.
Docket Nos. TM94–4–32–001, 000, TM95–1–32–000 and TM95–2–32–000, Colorado Interstate Gas Company
CAG–22.
Docket No. RM93–4–007, Standards For Electronic Bulletin Boards Required Under Part 284 of The Commission's Regulations
CAG–23.
Docket No. RP94–220–005, Northwest Pipeline Corporation
CAG–24.
Docket No. RP94–43–008, ANR Pipeline Company
CAG–25.
Docket Nos. RP90–108–027, *et al.* and RP91–82–017, Columbia Gas Transmission Corporation
Docket No. RP90–107–023, Columbia Gulf Transmission Company
CAG–26.
Docket No. CP91–2677–005, Iroquois Gas Transmission System, L.P.
Docket No. CP89–629–030, Tennessee Gas Pipeline Company
Docket No. CP89–661–029, Algonquin Gas Transmission Company
CAG–27. Omitted
CAG–28. Omitted
CAG–29.
Docket Nos. RP94–150–001, 000, 002, RP94–266–001 and RP94–384–002, ANR Pipeline Company
CAG–30.
Docket No. RP93–100–001, Dakota Gasification Company (successor-in-interest to Great Plains Gasification Associates)
Docket Nos. RP94–208–001, RP94–87–009, RP94–122–007, RP94–169–007, RP94–195–006, RP94–249–005, RP94–260–005, RP94–305–003 and RP94–364–002, Natural Gas Pipeline Company of America
Docket Nos. RP94–222–001, RP93–151–016, RP94–39–007, RP94–202–002 and RP94–309–004, Tennessee Gas Pipeline Company
Docket Nos. RP94–298–001 and TM94–14–29–001, Transcontinental Gas Pipe Line Corporation
Docket Nos. RP94–347–001, RP94–150–003, RP94–266–002 and RP94–384–003, ANR Pipeline Company
CAG–31.
Docket No. RP85–202–015, Trunkline Gas Company
CAG–32.
Docket Nos. RP85–203–018 and RP88–203–015, Panhandle Eastern Pipe Line Company
CAG–33.
Docket Nos. RP95–20–002 and 001, Southern Natural Gas Company
CAG–34.
Docket No. RP94–184–001, JMC Power Projects v. Tennessee Gas Pipeline Company
Docket No. RP94–261–003, Tennessee Gas Pipeline Company
CAG–35.
Docket No. GP95–2–001, Bureau of Land Management
CAG–36. Omitted
CAG–37.
Docket Nos. RP92–149–001, 002 and 003, Transcontinental Gas Pipe Line Corporation
CAG–38.
Docket No. RP94–421–004, National Fuel Gas Supply Corporation
CAG–39.
Docket No. MG88–7–008, Northern Natural Gas Company
CAG–40.
Docket No. CP93–200–003, CNG Transmission Corporation
Docket No. CP93–198–003, Big Sandy Gas Company
CAG–41.
Docket No. CP94–109–001, Transcontinental Gas Pipe Line Corporation
CAG–42.
Docket No. CP94–286–001, Northern Natural Gas Company
CAG–43.
Docket Nos. CP94–112–001 and CP88–94–009, National Fuel Gas Supply Corporation
Docket No. CP94–794–000, Empire State Pipeline
CAG–44.
Docket No. CP92–498–005, Trunkline Gas Company
CAG–45.
Docket Nos. CP92–508–006, RP94–80–004, 005 and 006, National Fuel Gas Supply Corporation
CAG–46.
Docket No. CP93–258–004, Mojave Pipeline Company
CAG–47.
Docket No. CP93–281–001, Paiute Pipeline Company
CAG–48.
Docket No. CP93–567–001, Texas Gas Transmission Corporation
CAG–49.
Docket No. CP94–137–001, Tennessee Gas Pipeline Company
CAG–50. Omitted
CAG–51.
Docket No. CP94–207–002, Southern California Gas Company
CAG–52.
Docket Nos. CP90–1050–000, 001, 002 and CP94–151–000, Panhandle Eastern Pipe Line Company
Docket No. CP94–152–000, Panhandle Field Services Company
CAG–53.
Docket No. CP95–116–000, Natural Gas Pipeline Company of America vs. Northern Border Pipeline Company
CAG–54. Omitted
CAG–55.
Docket No. RP94–315–000, Columbia Gas Transmission Corporation
Docket No. CP95–173–000, Wyoming Interstate Company, Ltd.
Docket No. RP94–316–000, Columbia Gas Transmission Corporation and Trailblazer Pipeline Company
Docket No. CP94–724–000, Trailblazer Pipeline Company
Docket No. RP94–317–000, Columbia Gas Transmission Corporation
Docket No. CP94–720–000, Natural Gas Pipeline Company of America
CAG–56.
Docket No. GT94–67–000, Texas Eastern Transmission Corporation

Hydro Agenda

H–1.
Reserved

Electric Agenda

E–1.
Docket No. EL95–5–000, General Electric Capital Corporation. Request for declaratory order.

Oil and Gas Agenda

I. Pipeline Rate Matters

PR–1.
Docket No. RM95–6–000, Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines. Notice requesting comments.

II. Pipeline Certificate Matters

PC–1.
Reserved

Dated: February 1, 1995.

Lois D. Cashell,

Secretary.

[FR Doc. 95–2950 Filed 2–2–95; 11:28 am]

BILLING CODE 6717–01–P

Federal Register

Monday
February 6, 1995

Part II

Department of Transportation

Federal Transit Administration

49 CFR Parts 653 and 654

Prevention of Prohibited Drug Use and Alcohol Misuse in Transit Operations; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653 and 654

[Docket No. 92–H or I]

RIN 2132–AA37; 2132–AA38

Prevention of Prohibited Drug Use in Transit Operations; Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Transit Administration (FTA) is proposing to amend its drug and alcohol testing rules to exempt volunteers and eliminate the citation requirement in the non-fatal, post-accident testing provision applicable to non-rail vehicles. We also seek comment on whether an ''accident'' should be defined to include the discharge of a firearm by a transit security officer. This rule, if adopted, is intended to increase the safety of mass transit and clarify certain provisions in the existing rules.

DATES: Comments on these proposed amendments must be submitted by April 7, 1995.

ADDRESSES: Comments should be sent to: Docket Clerk, Docket No. 92–H or I, Federal Transit Administration, Department of Transportation, 400 Seventh Street SW., Room 9316, Washington DC 20590. Comments will be available for inspection at this address Monday through Friday from 9 a.m. to 5 p.m. If you would like acknowledgment of receipt of your comment, please include a stamped, self-addressed postcard with your comment.

FOR FURTHER INFORMATION CONTACT: For program issues, Judy Meade or Rhonda Crawley of the Office of Safety and Security, Federal Transit Administration, (202) 366–2896. For legal questions, Nancy M. Zaczek or Daniel Duff, Office of the Chief Counsel, Federal Transit Administration, (202) 366–4011.

SUPPLEMENTARY INFORMATION: The FTA proposes to make the following changes to its drug and alcohol testing rules.

I. Volunteers

Under the final drug and alcohol rules, published in the **Federal Register** on February 15, 1994, at 59 FR 7531–7611, a volunteer who performs a safety-sensitive function generally is subject to testing for prohibited drugs and the misuse of alcohol. Since issuance of the final rules, however, a number of entities have urged the agency to exempt volunteers from application of the rules, contending that many volunteer drivers and dispatchers would be unwilling to continue to provide free services if they are subject to drug and alcohol testing. Indeed, volunteers may have a heightened concern about privacy and related issues that arise in connection with drug and alcohol testing since they are not paid for their services and often are not entitled to the benefits paid employees receive. Moreover, organizations that use volunteer drivers are concerned about the practicality and cost of covering volunteers under the rules.

To help frame this issue, we provide the following general information about the role of volunteers in mass transportation activities. Volunteers are used by a number of entities, particularly recipients of FTA formula funding for nonurbanized areas (formerly the section 18 program), which means that most such entities are not required to implement the drug and alcohol testing program until January 1, 1996, the implementation date for small operators. According to letters we have received, a typical volunteer is a community-minded senior citizen. Many volunteers act as drivers, but at least one agency uses volunteers to dispatch vehicles from their homes. The volunteers generally donate their time and often their own vehicles. In return, they often are reimbursed for mileage costs; some also are reimbursed for maintenance costs.

Entities that use volunteers often principally serve the elderly and persons with disabilities; one agency notes that it does not serve anyone under the age of 60. Several FTA recipients or subrecipients lease vehicles to the American Red Cross, which often uses volunteer drivers. Most serve sparsely populated areas; one agency indicates that it serves five rural communities with a combined population of 6,000 persons.

The number of volunteers used by the agencies varies greatly; for example, one agency uses 30 volunteers, another 450. One agency reported that it provided 16,000 trips using volunteer drivers, another 11,700 trips. One organization indicated that 70 percent of the trips it provided were for medical purposes.

Accordingly, FTA seeks comment on whether volunteers should be excluded from coverage under the rules. Does the potential loss of volunteer services from application of the rules outweigh any safety issues? Are those who volunteer their services unlikely or less likely to take prohibited drugs or operate a vehicle while alcohol impaired? Do the affected organizations evaluate their volunteers' performance? We note, moreover, that FTA is the only DOT drug and alcohol program specifically to require testing of volunteers, although the Federal Highway Administration's testing of those required to hold a Commercial Driver's License (CDL) would apply to any volunteers in that category.

II. Post-Accident Testing

The FTA proposes to change sections 653.45(a)(2)(i) and 654.33(a)(2)(i), which require a post-accident drug and alcohol test after a non-fatal accident when the mass transit vehicle involved is a bus, van, electric bus, or automobile. Those sections currently require a post-accident test if, among other things, the operator of the mass transit vehicle involved in the accident receives a citation from a State or local law enforcement official.

We have been advised that an operator of a mass transit vehicle rarely receives a citation from the police, or, if one is issued, often it is several days or weeks after the accident. Because a post-accident test must be conducted as soon as practicable following an accident, but no later than 32 hours after the accident for drug testing and 8 hours for alcohol testing, the citation requirement under the existing regulations effectively precludes a transit operator from conducting a post-accident drug and alcohol test in connection with accidents of this type. We therefore propose to change this portion of the post-accident testing provision by deleting the citation requirement and inserting in its place the phrase ''unless the employer determines, using the best information at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident.''

Under the proposed revision, a post-accident test would be required of an operator of a mass transit vehicle after a non-fatal accident involving a bus, van, electric bus, or automobile when an individual has been injured as a result of an occurrence associated with the operation of the vehicle and immediately receives medical attention away from the scene, or any vehicle suffers ''disabling damage.'' Once these conditions are met the operator of the vehicle must be given a post-accident test unless the employer has determined that the employee's actions could not have contributed to the accident.

We seek comment on this proposed amendment and note that it affects only the operator of the mass transit vehicle.

III. Definition of Accident—Armed Security Personnel

In the rules, an accident is limited to events involving the operation of a mass transit vehicle. Some commenters, however, note that the definition of accident does not include the discharge of a firearm by armed security personnel, who are considered safety-sensitive workers subject to the drug and alcohol testing program.

While we are aware of the danger that drug or alcohol impaired security personnel could pose to the traveling public, in developing the rules we assumed that, in the event of a discharge of a weapon, affected security personnel would be subject to an appropriate internal review of the circumstances that triggered the discharge. In this connection, FTA has stated that its drug and alcohol testing rules do not cover police officers who provide some services to a transit property, but are not supervised by the transit system, recognizing that in most municipalities police officers who discharge firearms are subject to their own internal comprehensive review procedures regarding any such incident.

We now seek comment on this issue in general but do not propose a revision of the rule in this Notice of Proposed Rulemaking. Should we amend the definition of ''accident'' to include the discharge of a firearm by a covered employee while on duty? Should all discharges be covered or just those deemed ''accidental,'' or only those incidents resulting in injury or death? Or is this matter one that should be left to the transit system to address under its own procedures? In this regard, we seek comment on the existing safety procedures applicable to armed security transit personnel in the event of a discharge of a weapon.

IV. Regulatory Process Matters

A. Executive Order 12688

The FTA evaluated the industry costs and benefits of the drug and alcohol testing rules when it issued 49 CFR parts 653 and 654 on February 15, 1994, at 59 FR 7531–7611. It is not anticipated that the proposed change to the post-accident testing provision would alter the costs and benefits of either part 653 or 654. On the other hand, the exclusion of volunteers from coverage under the rules would slightly lower the overall cost of the program.

B. Departmental Significance

Neither rule is a ''significant regulation'' as defined by the Department's Regulatory Policies and Procedures, because it proposes only minor changes to parts 653 and 654.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the FTA evaluated the effects of parts 653 and 654 on small entities when they were issued in February 1994. These proposed changes will not change that analysis.

D. Paperwork Reduction Act

This rule does not include information collection requirements subject to the Paperwork Reduction Act.

E. Executive Order 12612

We reviewed parts 653 and 654 under the requirements of Executive Order 12612 on Federalism. These proposed rules, if adopted, will not change those assessments.

F. National Environmental Policy Act

The agency determined that these regulations had no environmental implications when it issued parts 653 and 654, and there will be none under the proposed rules, if adopted.

G. Energy Impact Implications

These proposed regulations do not affect the use of energy.

List of Subjects in 49 CFR Parts 653 and 654

Alcohol testing, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety and Transportation.

For the reasons set forth in the preamble, the FTA proposes to amend Title 49, Code of Federal Regulations, parts 653 and 654 as follows:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for part 653 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

2. The definition of ''covered employee'' in section 653.7 is revised to read as follows:

§ 653.7 Definitions.

* * * * *

Covered employee means a person, including an applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part, or a volunteer who is required by Federal law or regulation to hold a Commercial Driver's License when performing a safety-sensitive function for the employer.

* * * * *

§ 653.45 [Amended]

3. The first sentence of section 653.45(a)(2)(i) is amended by removing ''if that employee has received a citation under State or local law for a moving traffic violation arising from the accident'' and adding ''unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident''.

PART 654—PREVENTION OF ALCOHOL MISUSE IN TRANSIT OPERATIONS

4. The authority citation for part 654 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

5. The definition of ''covered employee'' in section 654.7 is revised to read as follows:

§ 654.7 Definitions.

* * * * *

Covered employee means a person, including an applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part, or a volunteer who is required to hold a Commercial Driver's License under Federal law or regulation when performing a safety-sensitive function for the employer.

* * * * *

§ 654.33 [Amended]

6. The first sentence of section 654.33(a)(2)(i) is amended by removing ''if that employee has received a citation under State or local law for a moving traffic violation arising from the accident'' and adding ''unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident''.

Issued on: January 31, 1995.

Gordon J. Linton,

Administrator.

[FR Doc. 95–2732 Filed 2–3–95; 8:45 am]

BILLING CODE 4910–57–U

Federal Register

Monday
February 6, 1995

Part III

Office of Management and Budget

Cost Principles for Educational Institutions; Proposed Revisions to Circular A–21 and Proposed Recission of Circular A–88; Notices

OFFICE OF MANAGEMENT AND BUDGET

Cost Principles for Educational Institutions

AGENCY: Office of Management and Budget.

ACTION: Proposed revision of OMB Circular A–21.

SUMMARY: The Office of Management and Budget (OMB) proposes to revise OMB Circular A–21, ''Cost Principles for Educational Institutions'' by extending the applicability of certain Cost Accounting Standards Board (CASB) Cost Accounting Standards (CAS) and the CASB Disclosure Statement for sponsored agreements received by certain educational institutions, and amending the definition of equipment at educational institutions receiving Federal funds and covered by this Circular.

DATES: Comments should be received on or before March 8, 1995.

ADDRESSES: Financial Standards and Reporting Branch, Office of Federal Financial Management, Office of Management and Budget, Room 6025, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Federal agencies should contact the Financial Standards and Reporting Branch, Office of Management and Budget, (202) 395–3993. Non-Federal organizations should contact the organization's cognizant Federal funding agency.

SUPPLEMENTARY INFORMATION:

A. Purpose of Circular A–21

Office of Management and Budget (OMB) Circular A–21, ''Cost Principles for Educational Institutions,'' establishes principles for determining costs applicable to Federal grants, contracts, and other sponsored agreements with educational institutions.

B. Recent Prior Revisions

Circular A–21 was last amended in 1991 and 1993. The 1991 revisions excluded certain specified costs from reimbursements paid to colleges and universities receiving Federal awards and placed a limit on the amount of reimbursable administrative costs. That revision also required a certification to accompany each indirect cost proposal. The 1991 revision also added an exhibit containing a list of colleges and universities subject to Section J.9.F of Circular A–21. The 1993 revisions further clarified and standardized the Circular's principles for determining applicable costs.

C. Current revisions

The proposed revision incorporates the cost accounting standards for educational institutions published by the Cost Accounting Standards Board (CASB) on November 8, 1994, in the **Federal Register** (59 FR 55770), and extends the applicability of these standards to all sponsored agreements subject to this Circular (See Sections A.3 and B.2. of Circular A–21). This proposed revision also extends the applicability of the CASB Disclosure Statement (Form CASB DS–2 (REV 10/94)), published by the CASB on November 8, 1994, in the **Federal Register** (59 FR 55758), to such sponsored agreements. This proposed revision is reflected as Section C.10.a–e of Circular A–21.

By applying these CASB Standards and the CASB Disclosure Statement to sponsored agreements, OMB will: promote uniformity and consistency in the cost accounting practices followed by educational institutions when they estimate, accumulate, and report costs under sponsored agreements; facilitate the award and administration process; and, reduce the potential for disagreements concerning the cost accounting practices used to estimate, accumulate and report the costs of sponsored agreements.

On October 8, 1991, the CASB published a staff discussion paper (56 FR 50737). After consideration of the public comments received in response to the discussion paper, the CASB published an Advanced Notice of Proposed Rulemaking on June 2, 1992 (57 FR 23189). On December 21, 1992, after consideration of the public comments received in response to the advanced notice, the CASB published a Notice of Proposed Rulemaking (57 FR 60503). Seventy sets of public comments were received in response to the proposed rule and were fully considered. On November 8, 1994, the CASB published a Final Rule (59 FR 55746).

On July 26, 1993, OMB, in the preamble to a proposal making certain final revisions to Circular A–21 (58 FR 39997), stated that ''Consistent with the Board's stated expectations, OMB plans to extend the CASB's regulations and Standards applicable to educational institutions to all awards (contracts and grants) made to institutions that are major recipients of Federal research funds.'' At this time, public comments are invited on applying to sponsored agreements the CASB's Disclosure Statement Form, CASB DS–2, and the cost accounting standards (CAS) pertaining to educational institutions, contained in Chapter 99 of Title 48 of the Code of Federal Regulations (48 CFR Chapter 99), as amended, published on November 8, 1994 (59 FR 55746), effective January 9, 1995.

This proposed revision also amends the definition of equipment in Section J.16. by increasing the monetary threshold from $500 to $5000. This proposed revision conforms Circular A–21 to Circular A–110, ''Uniform Administrative Requirements for Grants with Institutions of Higher Education, Hospitals, and Non-Profit Organizations,'' published in the **Federal Register** (58 FR 62992) on November 29, 1993, and lessens the administrative burden associated with accounting for property.

In today's edition of the **Federal Register**, OMB is also proposing for 60 days of public comment a set of proposed revisions to Circular A–21 on which separate public comment is especially invited.

John B. Arthur,

Associate Director for Administration.

Circular A–21 is proposed to be revised as follows:

Amend Section ''C, Basic Considerations,'' by adding a new paragraph 10 as follows:

10. Cost Accounting Standards and Disclosure.

a. Applicability of Cost Accounting Standards Board's Disclosure Statement and Standards. The Cost Accounting Standards Board's (CASB) Disclosure Statement Form, CASB DS–2, and the cost accounting standards (CAS) pertaining to educational institutions contained in Chapter 99 of Title 48 of the Code of Federal Regulations (48 CFR Chapter 99), as amended, are incorporated herein by reference and are to be applied to sponsored agreements as specified below.

(1) *Disclosure Statement.*

(i) Educational institutions subject to this Circular shall disclose their cost accounting practices by filing a Disclosure Statement Form, CASB DS–2, which is reproduced in Appendix A, whenever the total awards received under sponsored agreements during the prior fiscal year equals or exceeds $25 million. An educational institution may meet the Disclosure Statement submission requirement by submitting the statement for each component unit that receives awards that in the aggregate equal or exceed $25 million under sponsored agreements, with the approval of the cognizant Federal agency responsible for indirect cost rate negotiations.

(ii) Required Disclosure Statements shall be filed with the cognizant Federal agency responsible for indirect cost rate negotiations within three months after the end of the fiscal year in which the educational institution meets the criteria in (i), except for educational institutions that establish a specific due date in accordance with paragraph (iii), or that are required to file a Disclosure Statement earlier under the terms and conditions of a CAS-covered contract.

(iii) Prior to December 31, 1995, those educational institutions meeting the criteria of (i) for the most recently completed fiscal year occurring during 1994, the cognizant Federal agency and the educational institution should establish, in writing, a specific due date for the first time submission of the required Disclosure Statement, as follows:

(a) Educational institutions listed as number 1–20 in Exhibit A of this Circular, or unlisted educational institutions that received more than $50 million under sponsored agreements during a fiscal year ending in calendar year 1994, shall file the required Disclosure Statement no later than June 30, 1996.

(b) Educational institutions listed as numbers 21–50 in Exhibit A of this Circular, or unlisted educational institutions that receive more than $25 but less than $50 million under sponsored agreements during a fiscal year ending in calendar year 1994, shall file the required Disclosure Statement no later than December 31, 1996.

(c) Educational institutions listed as numbers 51–99 in Exhibit A of this Circular shall file the required Disclosure Statement no later than June 30, 1997.

(iv) Amendments and revisions. Educational institutions are responsible for maintaining accurate Disclosure Statements and complying with disclosed practices. Educational institutions must amend required Disclosure Statements when disclosed practices are changed to comply with a new or modified Standard, or when practices are changed with or without agreement of the cognizant Federal agency. Amendments and revisions to Disclosure Statements may be submitted at any time and may be proposed by either the institution or the cognizant Federal agency. Resubmission of complete, updated Disclosure Statements is discouraged except when extensive changes require it to assist the review process.

(2) *Cost Accounting Standards (CAS).* An educational institution's cost accounting practices used to estimate, accumulate and report costs for sponsored agreements shall conform with the CAS specified in Part 9905 (48 CFR Part 9905), except for contracts incorporating the full CAS coverage specified in Part 9904 (48 CFR Part 9904). Those CAS in Part 9904 are not incorporated in this Circular. The applicability of the CAS under Circular A–21 will not be effective on the effective date specified in 9905.506–63 (January 9, 1995).

b. Cost and Funding Adjustments. Cost, price, and funding adjustments shall be made by the cognizant Federal agency if an institution fails to comply with an applicable CAS or fails to consistently follow its established or disclosed cost accounting practices when:

(1) Estimating costs in contract proposals and the resultant contract provides funds materially in excess of the amounts that would have been provided had the estimated costs been based on compliant cost accounting practices. In such cases, the contract prices or cost allowances shall be appropriately adjusted.

(2) Accumulating and reporting costs under a sponsored agreement. In such cases, the institution shall correct the noncompliance by changing to a compliant cost accounting practice and by adjusting the accumulated and reported costs to reflect a compliant practice.

c. *Overpayments.* Excess amounts paid in the aggregate by the Federal Government under sponsored agreements due to a noncompliant cost accounting practice used to estimate, accumulate, or report costs shall be credited or refunded, as deemed appropriate by the cognizant Federal agency. Interest applicable to the excess amounts paid in the aggregate during the period of noncompliance shall also be determined and collected in accordance with applicable Federal agency regulations.

d. *Compliant cost accounting practice changes.* Changes from one compliant cost accounting practice to another compliant practice that are approved by the cognizant Federal agency may require cost or funding adjustments if deemed appropriate by the cognizant Federal agency.

e. *Responsibilities.* The cognizant Federal agency shall:

(1) Determine cost or funding adjustments for all sponsored agreements in the aggregate on behalf of the Federal Government. Actions of the cognizant Federal agency official in making cost or funding adjustment determinations shall be coordinated with all affected Federal agencies to the extent necessary.

(2) Prescribe regulations and establish internal procedures to promptly determine on behalf of the Federal Government that a Disclosure Statement adequately discloses the educational institution's cost accounting practices and that the disclosed practices are compliant with applicable Cost Accounting Standards and the requirements of this Circular. The determination of adequacy and compliance shall be distributed to all affected agencies.

Amend Section J, paragraph 16.a.(1), ''General Provisions for Selected Items of Cost,'' to read as follows:

''Equipment'' means an article of nonexpendable, tangible personal property having a useful life of more than one year and an acquisition cost which exceeds the lesser of (a) the capitalization level established by the organization for financial statement purposes, or (b) $5000.

[FR Doc. 95–2872 Filed 2–3–95; 8:45 am]

BILLING CODE 3110–01–P

OFFICE OF MANAGEMENT AND BUDGET

Cost Principles for Educational Institutions

AGENCY: Office of Management and Budget.

ACTION: Proposed revisions to OMB Circular A–21 and proposed rescission of OMB Circular A–88.

SUMMARY: This Notice offers interested parties an opportunity to comment on proposed revisions to Office of Management and Budget (OMB) Circular A–21, ''Cost Principles for Educational Institutions'' and OMB's proposal to rescind OMB Circular A–88, ''Indirect Cost Rates, Audit, and Audit Followup at Educational Institutions.''

This proposed revision, together with a separate proposed revision published in this issue of the **Federal Register**, fulfills the Administration's commitment in the fiscal year 1995 budget to ''conduct a comprehensive review with the goal of improving the incentives that govern overhead reimbursement for a wide range of federal research grantees and contractors.'' It also reflects the Administration's policies regarding Circular A–21 as described in the fiscal year 1996 budget, transmitted to Congress on February 6, 1995. Of the 14 policies in this Notice, eight are proposed as revisions to Circular A–21 itself in this Notice, and the other six revisions, as described below, require

further development prior to proposed implementation.

In brief, the proposed revisions:

(1) clarify that, when an institution transitions from a use allowance methodology to a depreciation methodology, only the depreciation incurred from the time of the transition—calculated as if the asset had been depreciated over its entire life—may be allocated to federally-sponsored research;

(2) limit the use of special studies by prohibiting them for determining and allocating utility, library and student services costs;

(3) require all Federal funding agencies to use rates in effect at the time of initial award throughout the life of the sponsored agreement;

(4) eliminate the allowability of dependent tuition benefits;

(5) establish criteria for appropriate reimbursement of interest costs;

(6) rescind Circular A–88 and establish cost negotiation cognizance for educational institutions and cognizant agency responsibilities through Circular A–21;

(7) establish an interagency group of Federal officials responsible for coordinating policy development for sponsored agreements; and

(8) modify the terminology used in Circular A–21 to describe more accurately the various cost components of sponsored agreements.

In addition, this Notice announces OMB's decision to develop other revisions to Circular A–21. These include:

(1) establishing a process for assessing reasonable costs for research facility construction and renovation that may be allocated to facility cost pools and charged against sponsored agreements;

(2) developing a standard methodology for uniform treatment of specialized services, including computational centers and biohazards;

(3) developing standard benchmarks for utility costs over the next year, to be followed potentially by similar efforts for library and student services costs thereafter;

(4) developing and testing a model for charging space costs directly to research grants;

(5) examining and potentially revising the useful life schedule for equipment; and

(6) examining methods for explaining variations in facilities and administrative costs rates.

DATES: Comments should be received on or before April 7, 1995. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Interested parties are invited to comment on all of these proposed changes. Comments should be submitted to the Office of Management and Budget, Office of Federal Financial Management, Room 6025, New Executive Office Building, Washington, DC 20503. Brief comments (3 pages or less) may be sent via facsimile (fax: 202–395–3952).

FOR FURTHER INFORMATION CONTACT: Norwood Jackson, Office of Federal Financial Management, Office of Management and Budget, telephone (202) 395–3993.

SUPPLEMENTARY INFORMATION: In the fiscal year 1995 President's budget, the Administration committed to a comprehensive review of the costs of federally-sponsored research, with the goal of making the reimbursement system more defensible, equitable and understandable by reducing unexplainable variations in facilities and administrative rates; improving incentives for efficiency; and fostering consistency in the Federal Government's approach to administering support for sponsored research. The revisions proposed in this Notice are the result of this review.

In the spirit of other reinvention efforts, the review process guided by the Office of Management and Budget (OMB) and the Office of Science and Technology Policy (OSTP) was inclusive and open. OMB and OSTP solicited views, recommendations, and proposals from many parties, including Federal science funding agencies; the grantee community, including both university administrators and bench scientists; and Congressional staff and agencies.

Based on their input, the Administration decided that the review should focus on facilities costs, since the two other groups of research costs (direct costs and administration costs) have reasonably efficient mechanisms built into their funding policies. Direct costs, which support researchers, laboratory equipment, and supplies associated with a specific project, are subject to peer review and scientists have an opportunity to exert direct control over these costs. Administrative costs, which support the salaries of university research managers, support staff and other shared costs related to research, were capped at 26 percent of modified total direct costs by a 1991 revision to Circular A–21, ''Cost Principles for Educational Institutions.'' In contrast, facilities costs are not limited or peer reviewed. They account for almost all of the growth in research overhead rates over the last decade and explain much of the variation in rates among schools. Most of the specific changes proposed in this Notice address the facilities component of research costs.

The two sections below describe the eight revisions OMB proposes to make to Circular A–21 at this time, as well as a separate set of revisions that require further work before they can be proposed for implementation. OMB intends to propose these additional revisions for comment within one year of publication of this Notice. Finally, OMB intends to publish a recompilation of the entire Circular A–21 in the **Federal Register** by March 31, 1995, reflecting all final revisions through that date, and also to make the recompilation available electronically on the Internet.

PROPOSED REVISIONS TO OMB CIRCULAR A–21: The following explains the eight specific changes proposed to Circular A–21.

(1) Clarify the policy governing the transition from use allowance to depreciation and examine useful life schedules for equipment. Circular A–21 would be amended to clarify that an institution may recoup only the remaining depreciation expense representing the remaining useful life of an asset when the institution shifts from the use allowance methodology to depreciation. Because current language in Circular A–21 addressing the transition issue is not sufficiently precise, cognizant agencies have interpreted it differently. This revision is expected to have little impact because the vast majority of institutions now allocate costs consistent with the clarified policy.

This revision also clarifies that institutions must use either use allowance or depreciation, but not both, in allocating the costs of any class of assets to sponsored research. As in the past, Circular A–21 does not require institutions to shift from use allowance to depreciation. Institutions may continue to do so at their discretion.

(2) Limit use of special cost analysis studies. Circular A–21 would be amended so that the results of special studies for utility, library and student services costs could not be used to determine and allocate the costs of such services to sponsored research. The methodology for such studies is not specified in Circular A–21 and is a source of disagreement between cognizant agencies and institutions. The provision in Circular A–21 allowing special studies may have been appropriate at one time but now promotes disparity in rates and recovery. In conjunction with limiting

special studies, OMB proposes to develop and implement standard benchmarks for equitable allocation of utility, library and student services costs (see proposal #3 under ''Other Issues for Public Comment'' below).

(3) Require Federal funding agencies to use rates in effect at the time of initial award throughout the life of the sponsored agreement. Circular A–21 would be amended to require Federal science funding agencies to calculate outyear grant commitments using negotiated predetermined rates or other available negotiated rates at the time of the award. Funding agencies may not adjust future award levels for changes in negotiated rates taking effect after the initial award. This proposed change allows peer reviewers and funding agencies to know with certainty the total cost of an entire sponsored agreement throughout the decisionmaking process, and eliminates another point of inconsistency in Federal grant policies.

(4) Eliminate the allowability of dependent tuition benefit. To make Circular A–21 consistent with the Federal Acquisition Regulation, this Notice proposes to prohibit the allocation of dependent tuition benefits to sponsored agreements.

(5) Establish criteria for appropriate reimbursement of interest costs. The proposed revision would provide that interest on buildings and equipment would be allowable under certain circumstances which include a favorable lease/purchase analysis, a limit on the interest rate, and an offset of investment earnings against interest cost. The revision will serve to provide more consistency on interest allowability across OMB's three cost circulars: Circular A–122 for non-profit institutions, Circular A–87 for State and local governments, and Circular A–21 for educational institutions.

(6) Rescind Circular A–88 and establish cost negotiation cognizance for educational institutions and cognizant agency responsibilities through Circular A–21. This proposed revision rescinds Circular A–88. Cost negotiation cognizance would be assigned to the Department of Health and Human Services or the Office of Naval Research of the Department of Defense based on funding levels for sponsored agreements from these Departments. The Department providing the most funding would assume cognizance. Because of this change in approach, a listing of cognizant agency assignments is no longer necessary.

(7) Establish an interagency group of Federal officials to coordinate policy development for sponsored agreements. This proposed change would establish an interagency working group co-chaired by OMB and the Office of Science and Technology Policy (OSTP), comprised of officials responsible for policy development for sponsored agreements. This group would be charged with recommending changes to Circular A–21 and other OMB cost principles circulars based on recommendations of Federal agencies and non-Federal organizations. This group would recommend pilot projects designed to test ways to streamline the operations of sponsored agreements, reduce costs, or improve program delivery.

(8) Modify terminology used to describe research cost components. Circular A–21 would be amended to change terminology from ''indirect costs'' to ''facilities costs and administrative costs.'' The terms used currently to describe costs are perceived as insufficiently descriptive.

OTHER ISSUES FOR PUBLIC COMMENT: In addition to the specific revisions described above, OMB is also considering the following issues for possible future implementation through Circular A–21. Public comment is solicited on these issues. Should OMB decide to revise Circular A–21 to address these issues, specific changes will be proposed for comment at that time.

(1) Assessing reasonable costs for research facility construction and renovation that may be allocated to facility cost pools and charged against sponsored agreements or allocated directly. Circular A–21 requires that costs allocated to sponsored research be reasonable, and sets as a standard for reasonableness the ''prudent person'' test, i.e., whether a ''prudent person'' would have incurred the costs under similar circumstances. The rise in facilities costs over the past ten years and the significant variation in facilities rates among institutions have caused some to question how well and how consistently the ''prudent person'' test has been applied to facilities costs.

A committee of Federal officials from relevant agencies would be formed to develop benchmarks for the reasonable costs of construction of various types of space, adjusted for variable costs (e.g., energy, type of research) in each region of the U.S. The committee would seek input from the university community, private sector, and others. Benchmarks for renovation would be set at the same level as those for new construction. Benchmarks would be set at or slightly below a given standard to encourage efficiencies and would be indexed to inflation using a rate appropriate for construction. Benchmarks for each region of the country and by type of research facility would be published in the **Federal Register** for comment by January 2, 1996.

Cognizant agencies and institutions would use these benchmarks to determine the facility costs that may be charged to sponsored agreements. If proposed facility costs fall below the relevant benchmark, the depreciation or use allowance and interest costs of the building could be allocated to sponsored agreements in accordance with Circular A–21. If the proposed costs exceed the benchmarks, only the amounts provided by the benchmarks could be allocated without prior approval by the panel described below.

Review of costs above the benchmarks would be carried out by a panel of Federal officials. The review would consider special circumstances related to individual projects. If a university fails to obtain approval for reimbursement of the full allocated share of the facility costs, it could either accept the benchmark rate, or submit a revised justification.

The goals of the new process are to make as objective as possible the assessment and allocation of costs to sponsored research, to assure equitable results, and to encourage efficient construction and renovation of research facilities. Benchmarks will reflect only what the government will pay for space, and in no way will limit what universities may spend on infrastructure. The review process will be proposed in a future revision to Circular A–21.

(2) Develop a standard methodology for uniform treatment of specialized services. Circular A–21 requires that costs associated with the use of specialized service facilities (e.g., animal care, computational centers, and biohazards) be charged as direct costs. This requirement was intended to avoid assessing facility charges to investigators who do not use specialized services. To comply with this provision, some institutions have developed usage rates that reflect the full costs of the facility; as a result, charges for services such as animal per diem have increased as the total costs of operating the facility have been added to the daily costs of caring for each animal. Colleges and universities have not allocated the costs of specialized services uniformly to cost pools.

OMB intends to identify the operating expenses of special facilities that should be allocated to the direct costs and those to be included in a facility-specific rate or the general facilities cost pool. The costs associated with each category

should be uniform across institutions. The new methodology should promote greater uniformity of cost allocation among institutions while stabilizing the impact on project costs. This methodology will be proposed in a future revision to Circular A–21.

(3) Develop standard benchmarks for utility costs. In conjunction with the proposed revision in this Notice to eliminate special studies for utility costs, OMB plans to develop a benchmark ratio, based on determinants of the ratio of utility usage to research space, to standardize the allocation of such costs to sponsored research. These benchmarks will be proposed in a future revision to Circular A–21. After benchmarks for utility costs have been developed and implemented, OMB will also consider employing similar processes and models to develop benchmarks for libraries and student services.

(4) Develop and test a model for charging space costs directly to research grants. Over the last several years, policymakers, scientists and negotiators have discussed the idea of identifying project-specific space costs and charging those costs directly to grants. Direct charging would strengthen the incentive for colleges and universities to allocate space efficiently. Charging space directly to sponsored agreements would also help clarify the true costs of research and subject these costs to peer review and program oversight on a project-by-project basis.

The idea of charging space directly has not been adopted because some perceive it as too complicated from a technical perspective. The Federal Demonstration Project (FDP), which was established to test ways to improve flexibility and reduce the administrative costs associated with grantmaking, is well-suited to test the idea of direct charging space to grants. Further, the National Performance Review recommended using the FDP as a model program to reduce overhead on research grants. OMB has requested the FDP to develop a model for and to test direct charging of space.

(5) Examine and potentially revise the useful life schedule for equipment. OMB intends to review the current useful life schedules for equipment to ensure cost recovery policies keep pace with the changing nature of scientific equipment. Useful life schedules will be updated in future proposed revisions of Circular A–21, as appropriate.

(6) Examine methods for explaining variations in facilities and administrative costs rates. OMB will review ways of collecting data to explain rate variation, to include establishing a uniform chart of accounts. OMB solicits comments on methods that will provide appropriate data in a cost-effective manner.

John B. Arthur,

Associate Director for Administration.

The following are proposed revisions to sections A, E, G, and J of Circular A–21:

(1) Amend Section A by: (a) deleting paragraph 2.f, (b) changing the number of the current paragraph 3 to 4, and (c) adding a new paragraph 3 as follows:

3. Cognizant agency assignments and responsibilities.

a. Cognizant agency assignments. Cost negotiation cognizance is assigned to the Department of Health and Human Services (DHHS) or the Department of Defense, Office of Naval Research (ONR), based on which of these two Departments provides more Federal funding through sponsored agreements to an educational institution (including its component parts) for the most recent three years available using data published by the National Science Foundation in its annual report entitled ''Selected Data on Federal Support to Universities and Colleges.'' Cognizant assignments as of December 31, 1994, will continue in effect through educational institution years ending during 1997, except for those institutions with cognizant agencies other than DHHS or ONR. Cognizance for these institutions will transfer to DHHS or ONR not later than the end of the period covered by the current negotiated indirect cost agreement. Once cognizance is established, it will continue for a five-year period.

b. Acceptance of rates. The negotiated rates will be accepted by all Federal agencies. This does not preclude agencies from paying a lower rate pursuant to a class of sponsored agreements or a single sponsored agreement.

c. Correcting deficiencies. The cognizant agency will negotiate changes needed to correct systems deficiencies relating to accountability for sponsored agreements. The cognizant agency will seek the views of other affected agencies before entering into negotiations and invite their participation.

d. Resolving questioned costs. The cognizant agency will conduct any necessary negotiations with the institution regarding amounts questioned by audit that are due the government related to costs covered by a negotiated agreement. Prior to reaching final agreement with an institution, the cognizant agency will seek the views of other agencies concerned.

e. Reimbursement. Reimbursement to cognizant agencies for work performed under this Circular may be made by reimbursement billing under the Economy Act, 31 U.S.C. 1535.

f. Procedure for establishing facilities and administrative cost rates. The cognizant agency will arrange with the institution to provide copies of facilities and administrative cost proposals to all interested agencies. Agencies wanting such copies should notify the cognizant agency. Facilities and administrative cost rates will be established by one of the following methods:

(1) Formal negotiation. The cognizant agency will advise all interested agencies of its intention to negotiate, and schedule a pre-negotiation conference, if necessary. The cognizant agency will then arrange a negotiation conference with the institution. If an agency does not wish to be represented in these meetings, the cognizant agency will represent that agency.

(2) Other than formal negotiation. This will include cases where the institution and cognizant agency determine that agreement can be reached without a formal negotiation conference; for example, through correspondence or use of the simplified method described in this Circular.

g. Formalizing determinations and agreements. The cognizant agency will formalize all determinations or agreements reached with the institution and provide copies to other agencies having an interest.

h. Disputes and disagreements. Where the cognizant agency is unable to reach agreement with an institution with regard to facilities and administrative cost rates or audit resolution, the appeals system of the cognizant agency will be followed for resolution of the disagreement.

(2) Amend Section A., ''Purpose and scope'' by adding a new paragraph A.4. as follows:

4. *Interagency Working Group.* A Federal interagency working group will be responsible for coordination of cost policy development for sponsored agreements. The group will meet at least semi-annually. The Office of Management and Budget (OMB) and the Office of Science and Technology Policy (OSTP) will serve as Co-Chairs. Federal agencies represented will be the Office of Science and Technology Policy of the Executive Office of the President, the Department of Health and Human Services, the Office of Naval Research of the Department of Defense, the National Science Foundation, the Department of Education, the Department of Energy, and such other agencies as OMB designates. The responsibilities of the

group will be to recommend changes to OMB Circular A–21 and other OMB circulars based upon recommendations of Federal agencies and non-Federal organizations. The group will also recommend pilot projects designed to test ways to streamline the operations of sponsored agreements, reduce costs, or improve program delivery.

(3) Amend Section E, paragraph 2.d by adding a new subparagraph (5):

(5) Notwithstanding subparagraph (3), a cost analysis study or base other than that in section F shall not be used to distribute utility, library and student services costs.

(4) Amend Section G by inserting a new paragraph 7 and renumbering all subsequent paragraphs:

7. *Fixed rates for the life of the sponsored agreement.* Federal funding agencies shall use the rates for facilities and administrative costs in effect at the time of the initial award throughout the life of the sponsored agreement. If negotiated rate agreements do not extend through the life of the sponsored agreement at the time of the initial award, then the negotiated rate for the last year of the sponsored agreement shall be extended through the end of the life of the sponsored agreement. Award levels for sponsored agreements may not be adjusted in future years as a result of changes in negotiated rates.

(5) Replace Section J 12, paragraph b. (3), as follows:

(3) Where the depreciation method is introduced for application to assets for which use allowance was previously charged, depreciation on each asset will be computed as if the asset had been depreciated over its entire life (i.e., from the date the asset as acquired and ready for use to the date the asset is expected to be disposed of or otherwise withdrawn from use). The aggregate amount of use allowances and depreciation applicable to the asset (including imputed depreciation applicable to the period prior to the charging of use allowances as well as depreciation after the conversion) may be less than but in no case may exceed the total acquisition cost of the asset.

And add a new subparagraph J 12 c. (4):

(4) Notwithstanding c.(3), once an institution converts from one cost recovery methodology to another, acquisition costs not recovered may not be used in the calculation of the use allowance in c.(3).

(6) Amend Section J, paragraph 22.e. to read as follows:

e. Interest on debt issued to acquire capital assets used in support of sponsored agreements is unallowable unless:

(1) The educational institution performs a lease/purchase analysis in accordance with the provisions of OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations,'' and sections 5a, 8(c)(2), and 13 of OMB Circular A–94, ''Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs,'' which shows that purchasing through debt financing is less costly to the Federal Government than leasing. Discount rates used should be equal to the grantee's borrowing rates. The financial analysis must include a comparison of the present value of the projected total cash flows of both alternatives over the period the asset is expected to be used by the educational institution in carrying out federally-sponsored activities. The cash flows associated with purchasing the asset must include the purchase price, anticipated operating and maintenance costs (including property taxes, if applicable) not included in the debt financing, less any estimated asset salvage value at the end of the defined period. Projected rental costs should be based on the anticipated cost of renting comparable facilities or equipment at fair market rates over the defined period, and any expected maintenance costs and property taxes to be borne by the educational institution directly or as part of the lease arrangement.

(2) Financing is provided at an interest rate no higher than the fair market rate available to the educational institution from an unrelated third party.

(3) Investment earnings, including interest, on bond or loan principal, pending payment of the construction or acquisition costs, are used to offset allowable interest cost. Arbitrage earnings reportable to the Internal Revenue Service are not required to be offset against allowable interest costs.

(4) Educational institutions are also subject to the following conditions:

(a) Interest on debt issued to finance or refinance assets acquired before July 1, 1982, is not allowable.

(b) Federal cognizant agencies shall require educational institutions to compute interest on the excess of the Federal Government's depreciation and interest reimbursement payments over the educational institution's principal and interest payments, and that the educational institution treat the computed interest as a reduction in the interest expense to be reimbursed by the Federal Government. This provision is not applicable in instances where the educational institution makes an initial equity contribution of 25 percent or more to purchase the asset.

(c) Substantial relocation of federally-sponsored activities from a facility financed by indebtedness, the cost of which was funded in whole or part through Federal reimbursements, to another facility prior to the expiration of a period of 20 years requires Federal cognizant agency approval. The extent of the relocation, the amount of the Federal participation in the financing, and the depreciation charged to date may require negotiation of space charges for Federal programs.

(7) Amend Section J by adding a new paragraph 51:

51. *Tuition benefits for family members.* For educational institution's fiscal years beginning after September 30, 1997, charges for tuition benefits for any person other than the employee are no longer allowable.

(8) Amend the entire Circular by changing all references to ''indirect costs'' to ''facilities and administrative costs.''

Circular A–88 is proposed to be rescinded in its entirety.

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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1994. The CFR volume issued April 1, 1990, should be retained.

[5] No amendments to this volume were promulgated during the period July 1, 1991 to June 30, 1994. The CFR volume issued July 1, 1991, should be retained.

[6] No amendments to this volume were promulgated during the period January 1, 1993 to December 31, 1993. The CFR volume issued January 1, 1993, should be retained.